DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228

[Docket No. 2013–0011, Notice No. 1]

Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008

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

ACTION: Interim statement of agency policy and interpretation, hours of service laws as amended in 2008; request for public comment.

SUMMARY: The hours of service laws are Federal railroad safety laws that govern such matters as the maximum on-duty periods and minimum off-duty periods for railroad employees performing certain functions. In this document FRA supplements its existing interpretations of the hours of service laws by stating the agency's interim position on some additional interpretive questions primarily involving two provisions of those laws that were added in 2008. First, this document further interprets the hours of service laws related to train employees, particularly the ''consecutive-days'' provision of those laws. Although the consecutive-days provision was also discussed in FRA's June 2009 interim interpretations and February 2012 final interpretations, this document addresses the application of that provision to certain circumstances that were not specifically addressed in those interpretations. Second, this document further interprets the provision of the hours of service laws that makes signal employees operating motor vehicles subject to the hours of service laws and other hours of service requirements administered by FRA and exempt from the hours of service requirements promulgated by any other Federal authority. FRA invites public comment on these additional interim interpretations.

DATES: This document is effective October 24, 2013. Comments on the interim interpretations are due by November 25, 2013. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments on the interim interpretations set forth in this document, identified as Docket No. FRA–2013–0011, by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the Web site'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 for this interim statement of agency policy and interpretation. Note that all submissions received will be posted without change to *http://www.regulations.gov* including any personal information.

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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SUPPLEMENTARY INFORMATION:

Abbreviations of Terms Frequently Used in This Document

AAR Association of American Railroads
BRS Brotherhood of Railroad Signalmen
CFR Code of Federal Regulations
ch. chapter
FMCSA Federal Motor Carrier Safety Administration
FRA Federal Railroad Administration
HS hours of service (when the term is used as an adjective, except as part of the name of an Act of Congress or the title of a document, and not when the term is used as a noun)
RSIA Rail Safety Improvement Act of 2008, Public Law 110–432, Div. A, 122 Stat. 4848
Sec. Section (Unless otherwise noted, all references to a ''Sec.'' are to a section in title 49 of the U.S. Code.)
U.S.C. United States Code

Definitions of Terms Frequently Used in This Document [1]

Consecutive-days provision of the HS laws means 49 U.S.C. 21103(a)(4).

Consecutive-days provision of the Passenger Train Employee HS Regulations means 49 CFR 228.405(a)(3).

Extended-rest provision of the HS laws means 49 U.S.C. 21103(a)(4).

Extended-rest provision of the Passenger Train Employee HS Regulations means 49 CFR 228.405(a)(3).

Final Interpretations means FRA's ''Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Response to Public Comment'' published at 77 FR 12408–31 (February 29, 2012).

Freight train employee means a train employee who is not a passenger train employee.

June 2009 Interim Interpretations means FRA's ''Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Proposed Interpretation; Request for Public Comment'' published at 74 FR 30665–77 (June 26, 2009).

Passenger train employee means a *train employee who is engaged in commuter or intercity rail passenger transportation,* as defined by 49 CFR 228.403(c).

Passenger Train Employee HS Regulations means the passenger train employee hours of service regulations codified at 49 CFR part 228, subpart F.

Second Interim Interpretations means this document, FRA's ''Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008; Request for Public Comment'' published on September 24, 2013.

''Signal employee exclusivity'' provision means 49 U.S.C. 21104(e).

Secretary means the Secretary of Transportation.

Table of Contents for Supplementary Information

[1] See also Appendix A to this document for a table briefly summarizing the Federal hours of service requirements. Many terms frequently used in this document are defined in FRA's regulations at 49 CFR 228.5.

I. Executive Summary of the Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008 (Second Interim Interpretations)

A. Statutory and Regulatory Background and FRA's Previous Interpretations (Section II and Section III.A of the Second Interim Interpretations)

Federal laws governing railroad employees' hours of service date back to 1907 [2] and are presently codified as positive law at Secs. 21101–21109 [3] and 21303.[4] FRA, under delegations from the Secretary of Transportation,[5] has long administered the statutory HS requirements for the three groups of employees now covered by the statute; namely, employees performing the functions of a train employee, signal employee, or dispatching service employee, as those terms are defined at Sec. 21101. These terms are also defined for purposes of FRA's HS recordkeeping and reporting regulations (49 CFR part 228, subpart B) at 49 CFR 228.5 and discussed in FRA's ''Requirements of the Hours of Service Act; Statement of Agency Policy and Interpretation'' at 49 CFR part 228, appendix A, most of which was issued in the 1970s.

The HS statutory requirements have been amended several times over the years, most recently by the Rail Safety Improvement Act of 2008 [6] (RSIA). The RSIA substantially amended the requirements of Sec. 21103, applicable to a train employee, defined as an ''individual engaged in or connected with the movement of a train, including a hostler,'' [7] and the requirements of Sec. 21104, applicable to a signal employee, defined as an ''individual who is engaged in installing, repairing, or maintaining signal systems.'' [8] The RSIA also added new provisions at Secs. 21102(c) and 21109 that together made train employees providing rail passenger transportation subject not to Sec. 21103 but to HS regulations, if issued timely by the Secretary. Subsequently, FRA, as the Secretary's delegate, issued those regulations, codified at 49 CFR part 228, subpart F (Passenger Train Employee HS Regulations), which became effective on October 15, 2011. Until those regulations were issued, train employees providing commuter rail passenger transportation or intercity rail passenger transportation were subject to Sec. 21103 as it existed immediately before the RSIA amendments.

Following the enactment of the RSIA, FRA published an interim statement of agency policy and interpretation (June 2009 Interim Interpretations) to address questions of statutory interpretation that

[2] See the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Public Law 103–272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61–64b, and also revised and reenacted its provisions, without substantive change, as positive law at Sec. 21101–21108 and 21303.

[3] These sections may also be cited as 49 U.S.C. chapter 211.

[4] For a table comparing and contrasting the current Federal hours of service (HS) requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations.

[5] See 49 CFR 1.89.

[6] Public Law 110–432, Div. A, 122 Stat. 4848.

[7] Sec. 21101(5).

[8] Sec. 21101(4). The RSIA also amended the definition of ''signal employee'' effective October 16, 2008. Before the RSIA, the term meant ''an individual *employed by a railroad carrier* who is engaged in installing, repairing, or maintaining signal systems.'' Emphasis added.

had arisen so far with respect to the HS laws as amended by the RSIA (the new HS laws). 74 FR 30665 (June 26, 2009). Subsequently FRA published final interpretations that responded to public comments on the June 2009 Interim Interpretations and made certain revisions. 77 FR 12408 (February 29, 2012) (Final Interpretations). In responding to those comments, FRA recognized that the commenters had raised some important issues on which FRA had not taken a position in the June 2009 Interim Interpretations. Section III of the Second Interim Interpretations, below, addresses several such issues, each related primarily to the consecutive-days limitations and extended-rest requirements of Sec. 21103(a)(4), but also touching on other requirements of Sec. 21103 and on the extended-rest requirements of the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)). Further, following the publication of the Final Interpretations, in responding to a letter dated April 9, 2012, from the Association of American Railroads (AAR), FRA agreed in a letter dated June 22, 2012, to address the agency's exclusive Federal jurisdiction over the HS of signal employees in a notice to be published in the **Federal Register**. This issue is discussed in Section IV of the Second Interim Interpretations, below. For these reasons, FRA has decided to publish the Second Interim Interpretations to deal with these important issues, and to seek public comment on these issues, so that FRA will be able to speak to the concerns raised by the industry with full understanding of the positions of the various parts of the industry, and the practical implications of these interpretations.

B. Unavailability for Service for Purposes of the Statutory Consecutive-Days Provision (Sec. 21103(a)(4)) (Section III.B of the Second Interim Interpretations)

The extended-rest requirement of Sec. 21103(a)(4) is for a minimum of 48 or 72 ''consecutive hours off duty at the employee's home terminal *during which time the employee is unavailable for any service for any railroad carrier.''* Emphasis added. The question of what it means to be ''unavailable for service'' under Sec. 21103(a)(4) and, therefore, when an employee begins his or her required minimum 48 or 72 consecutive hours off duty at the employee's home terminal, was not addressed in the June 2009 Interim Interpretations. Rather, the issue was raised by implication in public comments on the June 2009 Interim Interpretations addressing the application of Sec. 21103(a)(4) with respect to employees who are released immediately after reporting for duty, if this release occurs on the sixth or seventh consecutive day on which the employee has initiated an on-duty period. FRA concludes that an employee who has worked less than the maximum of 12 consecutive hours or 12 hours in the aggregate under the HS laws, is considered to have received sufficient rest to comply with Sec. 21103(a)(4) if that employee in fact performs no further service for any railroad (''de facto unavailability'') during a 48- or 72-hour rest period at the employee's home terminal. The merely theoretical, legal availability of the employee to be required or allowed to return to work all or part of the remainder of the employee's maximum duty tour [9] does not in itself negate the employee's unavailability for purposes of Sec. 21103(a)(4). In addition, notification of the employee that the 48- or 72-hour rest period has begun is not required. Likewise, an employee who has reached the maximum of 12 hours of time on duty also may begin both the statutory minimum off-duty period and the 48- or 72-hour extended-rest period concurrently. FRA considered two alternatives to its interim interpretation. Under one alternative, an employee would not be deemed unavailable for service and subject to the extended rest required by Sec. 21103(a)(4) until the employee is legally unavailable for further service. The other alternative would base an employee's unavailability for service on the notice provided to the employee as to the nature and duration of the off-duty period at the time that the employee began the off-duty period. For reasons described below, FRA rejected both of these alternative interpretations.

C. Primarily, Initiating an On-duty Period for Purposes of Sec. 21103(a)(4); Secondarily, Application of Subsections (a)(1), (a)(3), (c)(1), (c)(4), and (e) of Sec. 21103 (Section III.C of the Second Interim Interpretations)

With certain exceptions, Sec. 21103(a)(4) prohibits a railroad from requiring or allowing an employee to go or remain on duty as a train employee after the employee has initiated an on-duty period each day on six consecutive days unless that employee has received the 48-hour rest period described above. If one of the exceptions applies, after the employee has initiated an on-duty period each day as a train employee on seven consecutive days, a 72-hour rest period is required before the employee goes on duty again as a train employee. The application of Sec. 21103(a)(4) to an employee who works in multiple types of covered service, either on a single day or during a period of six or seven consecutive days, was also not addressed in the June 2009 Interim Interpretations, but was raised in BLET and UTU's joint comment on those Interim Interpretations, in which they asked for clarification on how Sec. 21103 and Sec. 21105 (which provides the HS limitations for dispatching service employees) interact.

For reasons discussed in detail below, in Section III.C. 2.a–e of the Second Interim Interpretations, FRA interprets the relevant scope of ''on-duty period'' for purposes of Sec. 21103(a)(4) to extend only to on-duty periods as a train employee, including on-duty periods as either a freight train employee or a passenger train employee; accordingly, only when an individual performs train employee functions (i.e., is engaged in or connected with the movement of a train) will such an individual be considered to have ''initiated an on-duty period'' for the purposes of Sec. 21103(a)(4). Examples applying these principles are found primarily at Section III.C.2.h of the Second Interim Interpretations. FRA also considered an interpretation that would have counted all forms of covered service as initiating an on-duty period for the purposes of Sec. 21103(a)(4), so that even duty tours consisting only of service as a signal employee or a dispatching service employee, without any service as a train employee, would count toward the consecutive-days limitation of Sec. 21103(a)(4). This alternate interim interpretation was rejected for reasons explained in detail below in Section III.C. 2.a–c of the Second Interim Interpretations.

Section III.C.2.f–g of the Second Interim Interpretations provides further clarification and examples of how the various statutory and regulatory limitations work together, and the application of the respective commingled service provisions (Secs. 21103(b)(3), 21104(b)(2), and 21105(c) and 49 CFR 228.405(b)(3)) to individual duty tours in which multiple types of covered service are performed. When an employee performs service that is governed by more than one HS requirement, the railroad must comply with all of the requirements governing that service during the relevant period

[9] *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 to 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. 49 CFR 228.5.

of time, including the most stringent of the requirements governing that service.

As discussed in Section III.C. 2.e, for similar reasons, on an interim basis, FRA also interprets appropriate periods of time accrued in a passenger-train-employee duty tour to count toward the respective limitations of Sec. 21103(a)(1) (limiting on-duty time and certain other service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month) if the employee engages in freight-train-employee duty tours in the same calendar month. Likewise, as discussed in Section III.C.2.f–g, although a duty tour that does not include any time spent as a freight train employee does not trigger the 10-hour statutory minimum off-duty period between duty tours required by Sec. 21103(a)(3), uninterrupted as required by Sec. 21103(e), or the requirement for ''additional rest'' under Sec. 21103(c)(4), once these requirements have been triggered by a duty tour including service as a freight train employee, the required off-duty period, including any necessary ''additional rest,'' must be provided before the employee performs any other service for the railroad, or else that subsequent service will commingle with the previous duty tour under Sec. 21103(b)(3).

D. Requirements After Final Release at the Away-From-Home Terminal After the Employee Has Initiated an On-Duty Period on Six Consecutive Days (Section III.D of the Second Interim Interpretations)

FRA has also not previously addressed the following question, which involves an exception to Sec. 21103(a)(4): May an employee initiate a seventh on-duty period 24 hours or more after the employee is finally released from his or her sixth consecutive duty tour at the employee's away-from-home terminal, or does Sec. 21103(a)(4)(A)(i)–(ii) authorize a train employee to initiate an on-duty period only if it is consecutive to the sixth consecutive day? Under FRA's interim interpretation, the railroad may not require or allow a train employee to initiate an on-duty period after the employee has initiated an on-duty period each day for six consecutive days, has been finally released at the away-from-home terminal, and then has spent more than 24 hours off duty there. Rather, as described below, the railroad may require or allow the employee to engage in non-covered service at the away-from-home terminal, if desired, but must deadhead the employee to his or her home terminal and must then give the employee 48 hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform service as a freight train employee. In addition, if the railroad has nevertheless required or allowed the employee to initiate an on-duty period at the away-from-home terminal after the seventh consecutive day, the railroad must give the employee 72 hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform as a freight train employee. FRA considered, but rejected for reasons discussed below, an alternative reading of the text, that would understand the authorization to ''work a seventh consecutive day'' as allowing one final initiation of an on-duty period when the employee ends the sixth consecutive on-duty period at the away-from-home terminal, even if the initiation of that final on-duty period occurs after the seventh consecutive day.

E. ''Signal Employee Exclusivity'' Provision (Section IV of the Second Interim Interpretations)

Finally, the ''signal employee exclusivity'' provision (Section 21104(e)) states that the ''hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by [the HS laws]. Signal employees operating motor vehicles shall not be subject to any [HS] rules, duty hours or rest period rules promulgated by any Federal authority, including the [FMCSA] other than the [FRA].'' FRA revises its prior interpretation of that provision. In the Final Interpretations, FRA took the position that driving a motor vehicle itself was noncovered service that would not count as time on duty; only if the driving occurred within a duty tour that included time when the employee was engaged in installing, repairing or maintaining signal systems, would the time spent driving commingle under the commingling provision at Section 21104(b)(2) and count as time on duty. As a consequence, the time spent driving that was separate from a duty tour that contained covered service was not time on duty as a signal employee that was governed by Sec. 21104, and could be subject to the HS regulations of the Federal Motor Carrier Safety Administration (FMCSA HS regulations). For the reasons described below, FRA's new interim interpretation views an individual's operation of a motor vehicle, when such driving is for the purpose of allowing that individual to install, repair, or maintain signal systems, to be a function that is time on duty under the ''signal employee'' provisions of the HS laws, regardless of whether the operation of the motor vehicle is within the same duty tour as the direct work on the signal system, or is separated from it by at least 10 hours off duty. As a result, such operation of a motor vehicle for that purpose is itself subject to the limitations of the HS laws, and to the exclusivity provision that exempts the operation from other Federal requirements concerning HS, duty hours, or rest periods, including FMCSA's HS Regulations. It should be noted, however, that many of FRA's longstanding interpretations of travel time for signal employees are unchanged. For example, normal commuting between the individual's home and his or her regular reporting point is not time on duty. Those existing interpretations are briefly reiterated.

II. Background on the Hours of Service Laws and FRA's Previous Publications Interpreting the Hours of Service Laws as Amended in 2008

FRA is the agency of DOT that administers the Federal railroad safety laws.[10] Federal laws governing railroad employees' hours of service date back to 1907 [11] and are presently codified as positive law at Secs. 21101–21109 [12] and 21303.[13] FRA, under delegations from the Secretary of Transportation (Secretary), has long administered the statutory HS requirements for the three groups of employees now covered by the statute; namely, employees performing the functions of a train employee, signal employee, or dispatching service employee, as those terms are defined at Sec. 21101. These terms are also defined for purposes of FRA's hours of service recordkeeping and reporting regulations (49 CFR part 228, subpart B) at 49 CFR 228.5 and discussed in FRA's ''Requirements of the Hours of Service Act; Statement of

[10] See 49 U.S.C. 103 (the statutory provision establishing FRA and conferring on the Administrator of FRA the duties and powers to carry out certain Federal railroad safety laws, including the hours of service (HS) laws) and 49 CFR 1.89 (the delegation from the Secretary of Transportation to the Administrator of FRA to carry out all the Federal railroad safety laws).

[11] See the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Public Law 103–272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61–64b, and also revised and reenacted its provisions, without substantive change, as positive law at Sec. 21101–21108 and 21303.

[12] These sections may also be cited as 49 U.S.C. chapter 211.

[13] For a table comparing and contrasting the current Federal HS requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations.

Agency Policy and Interpretation'' at 49 CFR part 228, appendix A, most of which was issued in the 1970s.

The HS statutory requirements have been amended several times over the years, most recently by the Rail Safety Improvement Act of 2008 (RSIA). See Public Law 110–432, Div. A, 122 Stat. 4848, enacted October 16, 2008. Section 108 of the RSIA, captioned ''Hours-of-service reform,'' made important changes to 49 U.S.C. chapter (ch.) 211, Hours of Service, as amended through October 15, 2008 (the old HS laws). See 122 Stat. 4860–4866. Because of the significance of the amendments to the old HS laws made by Sec. 108 of the RSIA, FRA published an interim statement of agency policy and interpretation (June 2009 Interim Interpretations) to address questions of statutory interpretation that had arisen so far with respect to the HS laws as amended by the RSIA (the new HS laws). 74 FR 30665 (June 26, 2009). FRA also invited comment on the June 2009 Interim Interpretations.

Subsequently FRA published final interpretations that responded to public comments on the June 2009 Interim Interpretations and made certain revisions. 77 FR 12408 (February 29, 2012) (Final Interpretations). In responding to those comments, FRA recognized that the commenters had raised some important issues on which FRA had not taken a position in the June 2009 Interim Interpretations. Further, responding to a letter dated April 9, 2012, from AAR, about the Final Interpretations, FRA agreed in a letter dated June 22, 2012, to address the agency's exclusive Federal jurisdiction over the hours of service of signal employees in a notice to be published in the **Federal Register**. For these reasons, FRA has decided to publish these additional interim interpretations (Second Interim Interpretations) dealing with these important issues, and to seek public comment, so that FRA will be able to speak to the concerns raised by the industry with full understanding of the positions of the various parts of the industry on these issues.

III. Additional Questions Primarily Regarding the Consecutive-Days Limitation for Freight Train Employees and the Requirement of at Least 48 or 72 Hours Off Duty at the Home Terminal During Which Time the Employee Is Unavailable for Service for Any Railroad

A. Legislative, Statutory, and Regulatory Background on the Hours of Service Requirements Related to Train Employees

Sec. 108 of the RSIA amended in various ways the then-existing limitations in the old HS laws on the duty hours of ''train employees'' at 49 U.S.C. 21103 and added new provisions at 49 U.S.C. 21102(c) and 21109 that as a group reformed the Federal scheme for the hours of service of train employees. The RSIA did not amend the definition of ''train employee'' at 49 U.S.C. 21101(5) (which continues to read ''an individual engaged in or connected with the movement of a train, including a hostler'') and did not amend the rules for determining ''time on duty'' under 49 U.S.C. 21103 (which continues to provide for counting as ''time on duty'' any other type of service for the railroad that occurred within the same duty tour as the train-employee covered service).[14] However, the new provision at 49 U.S.C. 21102(c) created two separate sets of HS requirements for train employees based on the type of train service that the employees were performing at the relevant point in time.

In particular, train employees when not providing commuter rail passenger transportation or intercity rail passenger transportation but otherwise engaged in or connected with the movement of a train (described in this document as ''freight train employees'') became subject to Sec. 21103 as amended by the RSIA (new Sec. 21103 or [unmodified] Sec. 21103). In contrast, train employees ''when providing commuter rail passenger transportation or intercity rail passenger transportation'' (described in this document as ''passenger train employees'') instead remained subject to 49 U.S.C. Sec. 21103 as it existed on the day before the enactment of the RSIA (old Sec. 21103) until October 15, 2011 and then on October 15, 2011, became subject to FRA's regulations at 49 CFR part 228, subpart F, entitled ''Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation'' (Passenger Train Employee HS Regulations). 76 FR 50397 (Aug. 12, 2011). Those regulations define a ''train employee who is engaged in commuter or intercity rail transportation'' to include all train employees engaged in commuter or intercity rail passenger transportation, and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. 49 CFR 228.403(c). FRA intended by this language to clarify that train employees employed by passenger railroads who perform service such as work train service, or other such ancillary train service, as part of their employment for the commuter railroad or intercity passenger railroad, would be covered by the Passenger Train Employee HS Regulations, rather than the requirements of Sec. 21103. The definition also specifically excluded from the coverage of the Passenger Train Employee HS Regulations those train employees employed by other kinds of railroads who perform work train service or pilot service. 49 CFR 228.403(c).

The Passenger Train Employee HS Regulations establish rules for determining ''time on duty'' that are identical to the rules in Sec. 21103(b), but contain a somewhat different set of HS requirements for passenger train employees. See 49 CFR 228.401 and 228.405. For example, under these regulations, 12 hours on duty not consecutively but in aggregate service in a 24-hour period as a passenger train employee triggers a requirement for only 8 consecutive hours off duty, whereas under Sec. 21103(a)(3), 12 hours on duty in a 24-hour period (even if not 12 consecutive hours) as a freight train employee must be followed by 10 hours off duty, and under Sec. 21103(e) those hours must not be interrupted by a communication from the railroad ''that could reasonably be expected to disrupt the employee's rest[,]'' except in an emergency. In addition, the Passenger Train Employee HS Regulations contain no equivalent to several of the limitations added by the RSIA for freight train employees, such as Sec. 21103(e)'s requirement that minimum off-duty periods and periods of interim release must be uninterrupted by communications from the railroad ''that could reasonably be expected to disrupt the employee's rest,'' or Sec. 21103(a)(1)'s limit for freight train employees of 276 hours per calendar month spent either on duty, awaiting or in deadhead transportation from a duty assignment to the employee's point of final release, or in other mandatory service for the railroad.

[14] See 49 U.S.C. 21103(b)(3). See also definitions of ''commingled service'' and ''duty tour'' for purposes of FRA's HS recordkeeping regulations at 49 CFR 228.5.

Among the amendments to old Sec. 21103 made by Sec. 108(b) of the RSIA was the addition of a provision, codified at 49 U.S.C. 21103(a)(4) (Sec. 21103(a)(4)), that requires that, as a general rule, after a train employee initiates an on-duty period each day for six consecutive days,[15] the employee must have received ''at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier'' before the employee may go on duty again. Sec. 21103(a)(4)(A) provides an exception to this general rule: that if the on-duty period that was initiated on the sixth consecutive day ends at a location other than the employee's 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 carrier . . . .''

Sec. 21103(a)(4)(B) provides that employees may also initiate an on-duty period for a seventh consecutive day and must then receive 72 consecutive hours off duty at the employee's home terminal if, for a period of 18 months after the enactment of the RSIA, such schedules are expressly provided for in an existing collective bargaining agreement, or after that 18-month period has ended, such schedules are expressly provided for either by a collective bargaining agreement entered into during that period or provided for by a pilot program that is authorized by collective bargaining agreement or by a pilot program under the HS laws at Sec. 21108 related to work and rest cycles.

Sec. 21103(a)(4) also provides that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty (extended rest) if all of the following requirements are met: (1) The procedures of Sec. 20103 are followed (i.e., essentially, public notice and an opportunity for an oral presentation are provided prior to issuing the waiver); (2) a collective bargaining agreement provides a different arrangement; and (3) the Secretary determines that the arrangement is in the public interest and consistent with safety. See the undesignated last sentence of Sec. 21103(a)(4).

In the Final Interpretations, FRA construed ''day'' for the purposes of Sec. 21103(a)(4) to refer to the 24-hour period during which a duty tour takes place. Given that redefinition of ''day,'' two initiations of an on-duty period are on consecutive days where they are separated by less than 24 hours of time off duty, measured from the time of the employee's final release from duty until the time that the employee next reports for duty.[16]

B. When is a train employee unavailable for service for any railroad such that the extended rest of 48 or 72 hours required by sec. 21103(a)(4) may begin to run?

1. Summary of Issue and Interim Interpretation

The question of what it means to be ''unavailable for service'' under Sec. 21103(a)(4) and, therefore, when an employee begins his or her required minimum 48 or 72 hours off duty at his or her home terminal, was not addressed in the June 2009 Interim Interpretations. Rather, the issue was raised by implication in public comments on the June 2009 Interim Interpretations addressing the application of Sec. 21103(a)(4) with respect to employees who are released immediately after reporting for duty, if this release occurs on the sixth or seventh consecutive day on which the employee has initiated an on-duty period. See, e.g., comments of the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union, Docket No. FRA–2009–0057–0044, at 6. For the reasons discussed below, FRA concludes that an employee who has worked less than the maximum of 12 consecutive hours or 12 hours in the aggregate under the HS laws, will be considered to have received sufficient rest for the railroad to comply with Sec. 21103(a)(4) if that employee in fact is not required or permitted to perform further service (de facto unavailability'') during a 48- or 72-hour rest period. Furthermore, the merely theoretical, legal availability of the employee to be required or allowed to return to work all or part of the remainder of the employee's maximum duty tour, does not in itself negate the employee's unavailability for purposes of Sec. 21103(a)(4). and that notification of the employee that the 48- or 72-hour rest period has begun is not required. Naturally, an employee who has reached the maximum of 12 hours of time on duty also may begin both the statutory minimum off-duty period and the 48- or 72-hour extended rest period concurrently.

The language of Sec. 21103(a)(4)(A) and (B) states repeatedly that during the 48- or 72-hour off-duty period, the employee must be ''unavailable for any service for any railroad carrier.'' As was discussed in the Final Interpretations in section IV.B.1, 77 FR at 12420–21, FRA understands this statutory language to mean that the extended-rest period required by Sec. 21103(a)(4) begins when a train employee is ''finally released from duty'' within the meaning of Sec. 21103(b), which establishes the rules for determining under subsection (a) of this section the time a train employee is on or off duty[,]'' and that when the employee is finally released from duty, both the minimum extended-rest period required by Sec. 21103(a)(4) (48 or 72 hours as appropriate) and the other statutory minimum off-duty periods [17] begin to run concurrently, not consecutively. In the event that the railroad calls the employee back to perform additional covered service,[18] or other service for the carrier (such as to deadhead to a new point of final release prior to the completion of a statutory off-duty period), this additional service within the 24-hour period that began when the employee reported for duty is classified as ''time on duty'' or ''neither time on duty nor time off duty'' for purposes of Sec. 21103(a). as those terms are discussed in Sec. 21103(b), that will attach to and extend the prior duty tour. As a result, the required rest periods would both start anew at the point in time of the subsequent release from duty, and the period of time previously considered to be accruing towards the statutory minimum off-duty period before the employee was called for additional service would become either time on duty or an interim

[15] For additional discussion of the meaning of ''consecutive day'' in this context, see Final Interpretations, section IV.B.1, 77 FR at 12417–19.

[16] Note, however, that due to the nature of passenger train employee assignments and the time-specific limitations of the Passenger Train Employee HS Regulations, the consecutive-days limitation for passenger train employees considers the initiation of on-duty periods on a specified number of calendar days rather than 24-hour periods. See 49 CFR 228.405(a)(3).

[17] For train employees providing freight train service, the ''statutory minimum off-duty period'' is defined by Sec. 21103(a)(3) to be a minimum of 10 consecutive hours, as potentially extended by Sec. 21103(c)(4) if the combination of an employee's time on duty and time spent waiting for or in deadhead transportation to the point of final release exceeds 12 hours, with any time in excess of 12 hours added to the statutory minimum off-duty period. See also 49 CFR 228.5. While it is true that other rest periods required by the statute, such as the 48- or 72-hour rest period required by Sec. 21103(a)(4) and the additional rest that may be required under Sec. 21103(c)(4), are also ''statutory minimum'' rest periods, the term ''statutory minimum off-duty period'' has been defined in FRA's HS recordkeeping regulation at 49 CFR 228.5 to refer to the off-duty period required to begin a new 24-hour period for the purpose of calculating total time on duty.

[18] For train employees, ''covered service'' is service ''engaged in or connected with the movement of a train,'' as described in 49 U.S.C. 21101(5). See also definition of ''covered service'' at 49 CFR 228.5.

release.[19] Once an employee is finally released from duty after having initiated an on-duty period on a sixth or seventh consecutive day, the employee is required to receive a statutory minimum off-duty period of at least 10 hours, and the 48- or 72-hour extended rest period, respectively, either (1) when he or she has accumulated 12 or more hours of time on duty within the meaning of Sec. 21103(b), or (2) when the duty tour is at the 24-hour point from the beginning of the duty tour, therefore ending the employee's availability to accrue additional time on duty within the duty tour due to Sec. 21103(a)(3), whichever event occurs first. This is necessary in order to ensure the employee receives sufficient rest before being required or allowed to go on duty again as a freight train employee. If neither of these events occurs, an employee could lawfully (under the HS laws) be called back to perform further covered service or other service for the railroad within the same duty tour, regardless of the expectation of either the employee or the railroad at the time that the employee was released.

As will be described below, this retrospective determination of an employee's unavailability, such that an employee is deemed to have been unavailable for service during the times in which the employee does not, in fact, perform service, is consistent with the text of the HS laws and prior FRA interpretations of those laws, takes heed of the structure of railroad operations, and provides clarity to both employees and railroads. FRA seeks comment on this interim interpretation that ''unavailable'' for the purposes of Sec. 21103(a)(4) means de-facto unavailability.

2. Detailed Discussion of Interim Interpretation

Historically, FRA has not required employees or railroads to contemporaneously declare for what type of off-duty period the employee is being released, as there is no statutory requirement to provide such notification.[20] Rather, the classification of a duty period (and any periods of release within or following a duty tour) is determined by a retrospective look at the actions of the employee and the railroad to determine whether in fact the railroad required or allowed the employee to go or remain on duty during the purported period of release. Although a railroad may intend to provide an employee with an interim release, that release will ripen into a statutory minimum off-duty period as soon as the employee has had a sufficient number of hours off duty. Likewise, an employee may be released from duty and assume that the release is a final release that will be followed by a statutory minimum off-duty period, but be called back to resume the previous duty tour prior to or after an interim release of 4 hours or more, if the employee had not reached either the statutory maximum number of 12 hours of time on duty or the 24-hour point from the beginning of the duty tour. Nothing in the text of the RSIA compels FRA to change this interpretation of the laws, nor do the changes made to the statute by the RSIA reveal Congressional intent to modify this aspect of FRA's application of the laws. Congress could have required a railroad to specify at the time of release whether a period of off-duty time would be an interim release or a statutory minimum off-duty period, but has not chosen to do so.

Before arriving at the decision that the determination of unavailability should be made retrospectively and be based on the employee's de-facto unavailability, FRA considered two alternative interpretations of the requirement that the employee be unavailable for service for any railroad during the extended-rest period. FRA declines to adopt either of these alternative interpretations for the reasons explained below.

First, FRA could instead have established a formalistic, bright-line rule that if an employee is legally available (under the HS laws) to perform additional service for the railroad then the employee is not yet unavailable, for purposes of Sec. 21103(a)(4), to begin his or her 48 or 72 hours off duty. Take the example of an employee who has begun a duty tour and then is released from duty without having accumulated a total of 12 hours of time on duty in the duty tour. The employee is legally available to perform additional service for the railroad until the earlier of three circumstances—until (1) the employee completes the remainder of his or her 12 hours of time on duty in the duty tour; (2) the expiration of the 24-hour period that began at the commencement of the employee's duty tour; or (3) the completion of a statutory minimum off-duty period after the employee's release from duty, which would also cut short the maximum 24-hour period that began at the commencement of the duty tour and begin a new 24-hour period in which the employee will accrue time on duty in the next duty tour, regardless of whether any additional service is actually performed after the employee is released. In the first circumstance, the employee is no longer legally permitted to perform service under Sec. 21103(a)(2) because the employee has served the maximum of 12 hours in the duty tour. In the second circumstance (the expiration of the 24-hours period that began when the employee started the duty tour), the employee is no longer legally permitted to perform service under Sec. 21103(a)(3) and must be given 10 consecutive hours off duty because the employee has not had at least 10 consecutive hours off duty during the prior 24 hours. In the third circumstance, the employee's completion of the statutory minimum off-duty period has ended the employee's duty tour, and the employee's availability for service in that duty tour, and the employee is, therefore, no longer legally permitted to perform service under Sec. 21103(a)(4). Under this approach, the 48- or 72-hour off-duty period required by Sec. 21103(a)(4) would not begin to run until either the expiration of the 24-hour period that began when the employee reported for duty, or the beginning of a new 24-hour period by virtue of the employee's having had a statutory minimum off-duty period The employee may have already been off duty for several hours or even a statutory minimum off-duty period, from the time of the employee's release that ultimately became the employee's final release from that duty tour, to the end of the 24-hour period. In cases where the employee is off duty prior to the end of the 24-hour period, the practical effect of this approach would be to extend the 48- or 72-hour required off-duty period.

Second, FRA could have taken a situational/notice-focused approach to the interpretation of unavailability, in which the agency would analyze the actual circumstances of each period of off-duty time, and the expectations of the employee and the railroad when the period began, to determine if the employee was made aware that he or she was ''unavailable'' during a given period of time, such that the period of

[19] An interim release for train employees is a period available for rest lasting at least 4 hours within a duty tour, as described in Sec. 21103(b)(5)–(b)(7). If an employee receives 10 or more hours of time off duty, the time off duty becomes a statutory minimum off-duty period rather than an interim release (unless additional time off is required under Sec. 21103(c)(4)). See also 49 CFR 228.5.

[20] See Sec. 21103(b). See also, 49 CFR part 228, appendix A: ''Any period available for rest that is of four or more hours and is at a designated terminal is off-duty time.'' The appendix makes no reference to a requirement to notify an employee that the time available for rest is either an interim release or a statutory minimum off-duty period. See also S. Rep. 91–604 (1969), reprinted in 1969 U.S.C.C.A.N. 1636, 1640 (not identifying any expectation that employees would be informed of the length of an upcoming rest period).

time would count toward the 48- or 72-hour off-duty period. If the employee were not explicitly told he or she would no longer be available for service, the employee would remain available during the off-duty time until the expiration of the 24-hour period or until the employee had received a statutory minimum off-duty period.

Both of these alternative interpretations share a maximal interpretation of the word ''unavailable'' in the statutory language, by construing an employee as available during a period simply because service during the given period would not violate the HS laws (i.e., the railroad is not prohibited from requiring or allowing the employee to perform the service), even if the employee did not actually perform service during the given period. However, the implications of these maximal interpretations are inconsistent with FRA's existing interpretations.

For example, to adopt the situational/notice-focused interpretation, FRA would have to impose on railroads the burdensome new steps of (1) determining in advance whether a rest period provided to an employee who has not accrued 12 hours total time on duty within the duty tour is intended to be an interim release, or whether it will be a statutory minimum off-duty period of at least 10 hours that will render the employee unavailable for service, and (2) notifying the employee of this determination. Where such notification was not provided and the employee remained off duty, the ''situational'' analysis would result in an outcome identical to the broader bright-line rule; because the employee was not given notice that he or she would be made unavailable for additional service, the duty tour would not end until the end of the 24-hour period or the completion of a statutory minimum off-duty period. FRA would also be forced to determine how to handle situations in which a railroad requires further service from an employee who had not reached 12 hours total time on duty, after having notified the employee at the time of the release that he or she was being released for a statutory minimum off-duty period, and not available for subsequent service, given the lack of statutory or regulatory provisions to restrict such a practice, as discussed above.

For related reasons, the bright-line, formalistic rule also would require sharp deviation from past interpretations and other provisions in the statutory text. If FRA were to adopt a bright-line rule, generally requiring an employee to have had a statutory minimum off-duty period of 10 hours before the period of extended rest of 48 or 72 hours during which the employee is unavailable for service could begin, the total duration of the rest period required by new Sec. 21103 would, in effect, be extended by 10 hours. Nothing in the text of the RSIA requires explicitly that the extended-rest period and the statutory minimum off-duty period must run consecutively rather than concurrently. In contrast with Sec. 21103(a)(4), Sec. 21103(c) explicitly describes the time off duty required by that subsection as ''additional time off duty'' based on what has occurred in the preceding duty tour. Sec. 21103(a)(4)(A) simply describes the required time off as ''at least 48 consecutive hours off duty . . . [,]'' which is required after a series of duty tours. See also S. Rep. 110–270 at 20, which describes Sec. 21103(a)(4) as requiring an employee ''to be given 48 consecutive hours of rest'' immediately after discussing the statutory minimum off-duty period; had the rest periods been intended to run consecutively, the rest period required by Sec. 21103(a)(4) would have been described as ''additional'' or otherwise distinguished. The legislative history similarly lacks any discussion of the off-duty periods running consecutively. With scant support for broadening the total required rest period to 58 or 82 hours, FRA is reluctant to do so, absent a compelling reason to read the statute in such a manner.

Furthermore, both the situational/notice-focused approach and the bright-line, formalistic rule also apply poorly to the realities of the railroad industry. Because train employees are legally permitted to perform covered service for 12 hours in a 24-hour period, an employee who is released from duty after having performed less than 12 hours of service in a given duty tour is subject to being called for further service in that same duty tour. The situational/notice-focused approach would require employees to be notified in advance that they were not subject to being called for service after a release, contrary to past practice, in order to begin their extended-rest period prior to the end of the 24-hour period. The bright-line, formalistic rule, by instead stipulating that the extended-rest period may not begin until the 24-hour period is extinguished or exhausted, similarly does not account for the nature of railroad operations. Although a train employee who has performed 11 hours and 30 minutes of service may still theoretically return to perform service for another half hour, such brief service is exceedingly unlikely. FRA believes that requiring an employee in this situation to have a statutory minimum off-duty period or reach the end of the 24-hour period before he or she may begin the extended-rest period required by Sec. 21103(a)(4) takes an excessively formalist position on what it means for an employee to be ''unavailable.''

Finally, both the situational/notice-focused approach and the bright-line, formalistic rule would serve to create confusion as to how much rest is required. Because the extended-rest period would begin only when the employee became legally unavailable for further covered service, the start of the 48- or 72-hour period would generally be at the end of the 24-hour period that began when the employee initiated his or her sixth or seventh consecutive duty tour. However, if the employee were finally released from duty for a statutory minimum off-duty period less than 14 hours after initiating the on-duty period, then the extended-rest period would instead begin at the end of the employee's statutory minimum off-duty period. As such, under both of these alternative rules (except under the situational approach in which the employee is notified of his or her unavailability at the time of the employee's release, and does not in fact perform further service), the 48- or 72-hour extended-rest period could be lengthened by 10 hours or more beyond the statutory requirement. In addition, the required length of the aggregate minimum rest period will vary depending on the length of the employee's most recent duty tour, including interim releases and limbo time resulting from deadheading from a duty assignment to the place of final release, and whether the employee has reached his or her maximum of 276 hours for the calendar month under Sec. 21103(a)(1). In order for an employee to know when he or she may next be called to report for duty, the employee would have to be far more familiar with the intricacies of the HS laws then had previously been required.

Of the three possible interpretations, FRA believes that its chosen interpretation, discussed above, which treats employees as unavailable for service when they are not in fact required or allowed to perform service (regardless of whether the employee might legally have been called to perform further service or whether the employee was notified in advance that the release would be for 48 or 72 hours), hews most closely to the language and intent of the statute. In addition to requiring more rest than specifically required by the statutory language, both of the alternative interpretations would also require significant changes to the railroad industry beyond those

contemplated by Congress. The complexity of both of the alternative interpretations, in conjunction with those changes, would also create a significant risk of confusion in the industry, possibly leading to decreased compliance with the HS laws. Accordingly, FRA will interpret the extended-rest period as running concurrently with the statutory minimum off-duty period, with both beginning at the time an employee is finally released from his or her sixth or seventh consecutive duty tour. FRA seeks comment on this interim interpretation.

C. How does Sec. 21103(a)(4) apply to an employee who initiates an on-duty period performing multiple types of covered service during one duty tour or within a period of six or seven consecutive days? How do subsections (a)(1), (a)(3), (c)(1), (c)(4), and (e) of Sec. 21103 apply to an employee performing multiple types of covered service within the relevant time periods?

1. Summary of Issues and Interim Interpretation

The application of Sec. 21103(a)(4) to an employee who works in multiple types of covered service,[21] either on a single day or during a period of six or seven consecutive days, was not addressed in the June 2009 Interim Interpretations. The issue was raised in BLET and UTU's joint comment on the June 2009 Interim Interpretations, in which they asked for clarification on how Sec. 21103 and Sec. 21105 (which provides the HS limitations for dispatching-service employees) interact. The unions described an employee who regularly performs covered service as a train employee, but who occasionally works in a yardmaster position that may or may not include covered service as a dispatching service employee.

The language of Sec. 21103(a)(4) is ambiguous and susceptible to several reasonable interpretations. Sec. 21103(b) establishes the various rules to apply ''[i]n determining under subsection (a) of this section the time a train employee is on or off duty. . . .'' It is arguable, however, that, even though Sec. 21103(b) determines what is ''time on duty'' or ''time off duty'' for purposes of Section 21103(a), Sec. 21103(b) does not determine what is an ''on-duty period'' for purposes of Sec. 21103(a)(4). For the reasons discussed below, on an interim basis, FRA interprets the relevant scope of ''on-duty period'' for purposes of Sec. 21103(a)(4) to extend only to on-duty periods as a train employee, including on-duty periods as either a freight train employee or a passenger train employee; accordingly, only when an individual performs train employee functions (i.e., is engaged in or connected with the movement of a train) will such an individual be considered to have ''initiated an on-duty period'' for the purposes of Sec. 21103(a)(4). Therefore, only an on-duty period that includes service as either a freight train employee or a passenger train employee is counted as the initiation of an on-duty period for the purposes of Sec. 21103(a)(4).

FRA does not consider an on-duty period including only signal-employee covered service or only dispatching-service-employee covered service or a combination of these two types of service to constitute the initiation of an ''on-duty period'' under Sec. 21103(a)(4). FRA seeks comment on this interim interpretation.

Further, because the limitation of Sec. 21103(a)(4) prohibits only going or remaining on duty as a freight train employee,[22] FRA's interim interpretation is that once the extended-rest requirement is triggered (by an employee initiating on-duty periods as a freight train employee or a passenger train employee each day on six or seven consecutive days), the employee is barred from performing covered service as a freight train employee until he or she has had the extended rest required by Sec. 21103(a)(4), but he or she is not barred by Sec. 21103(a)(4) from reporting for duty as a passenger train employee.[23] Nor is the employee barred by Sec. 21103(a)(4) from reporting for duty as either a signal employee or a dispatching service employee, because neither of these types of covered service is subject to a consecutive-days limitation. FRA likewise seeks comment on this interim interpretation.

FRA also invites comment on its interim interpretation that appropriate periods of time accrued in a passenger-train-employee duty tour count towards the respective limitations of Sec. 21103(a)(1) (limiting on-duty time and certain other service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month) if the employee also engages in freight-train-employee duty tours in the same calendar month. FRA also requests comment on its related interim interpretation that while a duty tour that does not include any time spent as a freight train employee may not trigger the requirement for additional rest under Sec. 21103(c)(4), once the additional rest requirement has been triggered, the additional rest is added to the statutory minimum off-duty period that must be provided before the employee performs any other service, or that subsequent service will commingle with the previous duty tour.

2. Detailed Discussion of Interim Interpretation

In general, the function-based nature of the HS laws requires a contemporaneous determination of what covered service, if any, an individual has performed or is performing within relevant time periods, rather than considering any individual employee as always a covered-service employee based on the employee's job title, or the functions that the employee is qualified to perform, regardless of the actual functions performed by the employee during a given period of time. For example, to ascertain if a locomotive engineer who has been performing freight-train-employee covered service is in violation of the 12-hour limitation on total time on duty in a duty tour at a given moment, one would look to the characteristics of that individual's service for the railroad and decide, using Sec. 21103(b) as the guide for determining which periods of time were time on duty, whether the individual had accrued more than 12 hours of total time on duty, and therefore whether the railroad would violate Sec. 21103(a)(2) by allowing the individual to remain on duty. This application of the statute was relatively simple for the HS limitations that existed prior to the enactment of the RSIA, because both the limitations on total time on duty and minimum off-duty periods were fairly easily applied and, most importantly, only affected the immediate duty tour. Under old Sec. 21103(a), after 12 hours on duty as a train employee, the employee was required to have 10 hours off duty prior to performing any additional service; after less than 12 hours on duty as a train employee, the employee was required to have 8 hours off duty prior to perform any additional service. However, the RSIA's amendments to the HS laws now include limitations on service as a train employee that apply to much longer periods of time than a single duty tour.

[21] ''Covered service'' refers to any service subject to either Sec. 21103 (applicable to freight train employees), Sec. 21104 (applicable to signal employees), Sec. 21105 (applicable to dispatching service employees), or FRA's Passenger Train Employee HS Regulations (applicable to passenger train employees). See also 49 CFR 228.5, definition of ''Covered service.''

[22] See 49 U.S.C. 21102(c)(3); see also 49 CFR 228.405.

[23] However, if the employee had also reached the consecutive-days limitation in 49 CFR 228.405(a)(3), the employee would be barred by that regulatory provision from performing covered service as a passenger train employee.

In applying these limitations that look back and are applied to an employee's activities either during a number of previous, consecutive days as in Sec. 21103(a)(4), or during an entire calendar month as in Sec. 21103(a)(1) and (c)(1), this temporal frame of reference becomes much more important.[24] Each of the limitations of Sec. 21103(a) is phrased in the equivalent of the present tense [25] with the prior conduct discussed in the present perfect tense, indicating that the appropriate frame of reference is in the moment that a train employee is potentially required or allowed to engage in some activity—generally [26] remaining on duty or going on duty.[27]

With respect to the consecutive-days limitation, the result is that the limitation applies in the context of determining whether a train employee may be required or allowed to report for duty at a particular time, based on the employee's prior history of initiating on-duty periods. At the time that the employee reports for duty, the employee must necessarily be a train employee subject to Sec. 21103. Of course, if the employee were not subject to Sec. 21103 at a given time, he or she would not need to determine if Sec. 21103(a)(4) would prohibit the railroad from requiring or allowing him or her to report for duty.

In determining the proper application of the consecutive-days limitation, the operative question is as follows: When a train employee looks back upon his or her prior service for the railroad in light of Sec. 21103(a)(4), does ''an on-duty period'' refer to (1) any form of on-duty period under 49 U.S.C. ch. 211 or FRA's HS regulations for passenger train employees authorized by that chapter; or (2) ''the time a train employee is on duty'' under Sec. 21103(b)(2), meaning as either a freight train employee or a passenger train employee?

a. Option 1: Broad Reading—All Forms of Covered Service Count as Initiating an On-Duty Period Under Sec. 21103(a)(4)

A broad reading of ''on-duty period'' recognizes that Congress chose to distinguish between the terms ''time on duty'' and ''on-duty period,'' and incorporates that distinction into the understanding of which on-duty periods should be included in the determination of whether a train employee may report for duty without violating Sec. 21103(a)(4). The broad reading is consistent with the canon of statutory interpretation that distinctions in terms used by Congress should be given effect.[28] In addition, FRA has previously acknowledged, in a contemporaneous interpretation of Sec. 21103(a)(4) that ''on-duty period'' cannot be synonymous with ''time on duty.'' See FRA's Final Interpretations, section IV.B.4, ''Does the initiation of an on-duty period incident to an early release qualify as an initiation for the purposes of sec. 21103(a)(4)?'' Final Interpretations, 77 FR at 12420–21. In order to avoid the peculiar outcome of an employee's forced release from duty immediately after reporting for duty on a sixth consecutive day, FRA linked the concept of the ''on-duty period'' in this particular context to duty tours, with the ''on-duty period'' ending only at the end of the duty tour when the employee is finally released from duty.[29]

There is also statutory support for understanding ''on-duty period'' in the context of 49 U.S.C. ch. 211 as a whole, rather than consisting of only duty tours that include ''time on duty'' as defined in Sec. 21103(b). Prior to the 1994 recodification of the HS laws, which changed only the form of the laws but not their meaning,[30] ''time on duty'' specifically included ''[s]uch period of time as is otherwise provided by this Act.'' Sec. 1(b)(3)(E) of the Hours of Service Act, then codified at 45 U.S.C. 61 (1994); repealed, revised, and reenacted without substantive change by Public Law 103–272. Although the current provisions governing signal employees and dispatching service employees govern the maximum time on duty in a duty tour and minimum off-duty periods of such individuals, as the more specifically applicable sections of the chapter, this definition of the term ''on duty period'' would nonetheless include time on duty in both of the other forms of covered service as within the scope of the ''on-duty period'' referenced in Sec. 21103(a)(4). In the current text of the HS laws, 49 U.S.C. 21102(b) and 21109(a)(1) make reference to ''on duty'' generally to apply to all forms of covered service. Hereinafter, any reference to a subsection is to subsection of Sec. 21103. Additionally, the ''signal employee exclusivity'' provision, discussed in more detail in Section IV of this document, below, requires that the hours of service of signal employees ''shall be governed exclusively by this *chapter*'' (emphasis added), suggesting a broader scope. Each of these factors provides intrinsic textual support to the broad interpretation of Sec. 21103(a)(4), which would include all forms of on-duty periods subject to 49 U.S.C. ch. 211 or FRA's Passenger Train Employee HS Regulations authorized by that chapter (meaning as a freight train employee, a passenger train employee, a signal employee, or a dispatching service employee), as within the scope of Sec. 21103(a)(4)'s counting of consecutive days.

b. Option 2: Narrow Reading—Only Duty Tours Including Time Engaged in or Connected With the Movement of a Train Counts as Initiating an On-Duty Period Under Sec. 21103(a)(4)

Alternatively to Option 1 above, a narrow reading of ''on-duty period'' starts from the premise that Secs. 21103,

[24] Sec. 21103(a)(1) institutes a monthly 276-hour limitation on total time on duty, time spent waiting for or in deadhead transportation to the place of final release, and any other mandatory service for the carrier.

[25] Literally, the limitations set forth at Sec. 21103(a) are written as prohibitions against the railroad requiring or allowing one of its train employees to commit a certain act (i.e., generally, to go or remain on duty) after certain prior conduct by the employee. The relevant provisions read: ''a railroad carrier and its officers and agents may not require or allow a train employee to . . . remain or go on duty after that employee has initiated an on-duty period each day. . . .''

[26] Sec. 21103(a)(1) also prohibits a railroad from requiring or allowing a train employee to ''*be in any other mandatory service for the carrier* in any calendar month where the employee has spent a total of 276 hours [in specified service for the railroad] . . .'' Emphasis added.

[27] See, e.g., *Carr* v. *U.S.,* 130 S.Ct. 2229, 2236 (2010) (''Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach.'')

[28] See Sutherland § 46:6 (''[C]ourts do not construe different terms within a statute to embody the same meaning. However, it is possible to interpret an imprecise term differently in two separate sections of a statute which have different purposes. Yet when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'')

[29] ''[T]he restriction of Sec. 21103(a)(4) does not apply until the employee is finally released from duty; that is, an employee may continue to perform covered service until the end of the relevant duty tour, including any periods of interim release (because, during an interim release, the employee is not 'finally' released from duty).'' If FRA had instead considered an on-duty period to be something less than a duty tour, an employee who reported for duty on his or her sixth consecutive day, but was released from duty because, for example, the train for which the employee was called was not in fact available, that release would trigger the 48-hour rest requirement, because the employee had reported for duty, thereby initiating the on-duty period. However, as interpreted by FRA, the employee may be released for an interim release, with the possibility of being called to perform further service within the same duty tour, and the 48-hour rest requirement of Sec. 21103(a)(4) would not be triggered until the employee's final release from that duty tour. *Id.* at 12421.

[30] See Sutherland 28:11 (''Inasmuch as the function of a code is principally to reorganize the law and to state it in simpler form, the presumption is that a change in language is for purposes of clarity rather than for a change in meaning.'') The legislative history of the 1994 recodification also makes clear that the legislation did not create any substantive change to the application of any of the recodified laws, including the application of the HS laws. H. Rep. No. 1758, at 1, 3, 104–108 (1993).

21104, and 21105 are distinct entities. Because each of the sections refers to time performing the respective forms of covered service as ''time on duty,'' the narrow reading implies that the sections must be read as wholly exclusive from one another. Under this reading, the fact that a form of covered service is recognized as time on duty under one section is irrelevant to its treatment under another section. This implication leads to the interpretation that, because Sec. 21103(b) defines ''the time a train employee is on or off duty,'' and because the employee is generally only subject to Sec. 21103 when he or she is on duty as a train employee, only time that is time on duty under Sec. 21103(b) should be considered a period of time on duty (i.e., an ''on-duty period'') for the purposes of Sec. 21103(a)(4). As such, only a duty tour including ''time the employee is engaged in or connected with the movement of a train,'' as specified by Sec. 21103(b)(2), is counted as a duty tour including the initiation of an on-duty period for the purposes of Sec. 21103(a)(4). Neither covered service solely as a signal employee as defined in Sec. 21104, nor covered service solely as a dispatching service employee as defined in Sec. 21105, is time engaged in or connected with the movement of a train. Without time, in the course of a duty tour, during which the individual is engaged in or connected with the movement of a train, the individual is not on duty under Sec. 21103(a), including Sec. 21103(a)(4), and therefore, under the narrow reading, the individual has not initiated an ''on-duty period.''

c. Decision: FRA Chooses the Narrow Reading of ''On-Duty Period'' for Purposes of Sec. 21103(a)(4)

Although FRA views both of these readings of ''on-duty period'' as reasonable, the narrow reading of ''on-duty period'' is more consistent with FRA's existing interpretations, which treat Secs. 21103, 21104, and 21105 as analytically distinct from one another. FRA also recognizes the potential for confusion that could result from applying the consecutive-days limitation to individuals for duty tours in which no train-employee covered service was performed. Prior agency interpretations noted that—''[w]hen an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty-time.'' See discussion at 49 CFR part 228, app. A, under the heading ''General Provisions (Applicable to All Covered Service),'' ''Commingled Service.'' The narrow reading maintains that understanding by counting days toward the consecutive-days limitation only when an individual performs train-employee covered service, regardless of what other activities the individual may perform during such duty tours. See, below, Section III.C.2.d–h of this document for further discussion and application of this principle.

FRA recognizes that duty tours that contain only covered service as a signal employee or a dispatching service employee may contribute to the fatigue of the employees who perform such service, and that Congress established other limitations on the hours of service of employees performing these functions. In addition, an employee's service for a railroad that is not covered service under the hours of service laws could also contribute to fatigue. FRA believes that the most logical reading of the statutory language would apply the consecutive-days limitation of Sec. 21103(a)(4) only to duty tours including covered service as a train employee, for the reasons described above. However, FRA will monitor the situation, and may consider revising this interpretation in the future if the fatigue implications warrant it.

d. Further Clarification: Service as a Passenger Train Employee Is Within the Scope of ''On-Duty Period'' Under Sec. 21103(a)(4), Despite the Sec. 21102(c) Exemption

With the adoption of the narrow reading of ''on-duty period,'' which includes only periods of time on duty as a train employee within the scope of that term in Sec. 21103(a)(4), an additional question is presented: does a period of time on duty spent exclusively as a passenger train employee (who is subject to the limitations of the Passenger Train Employee HS Regulations, rather than Sec. 21103, according to Sec. 21102(c)(3)) count as an ''on-duty period'' for the purposes of Sec. 21103(a)(4)? FRA believes that to include periods of time on duty as a passenger train employee as an on-duty period for the purposes of Sec. 21103(a)(4) is most consistent with the text of the statute as a whole and with the Passenger Train Employee HS Regulations as a whole.

In the RSIA, Congress did not disturb the longstanding functional approach to determining when a train employee would be subject to the new Sec. 21103, and when a train employee would be subject first to old Sec. 21103, and ultimately to FRA's regulations governing train employees engaged in commuter or intercity rail passenger transportation. Employees performing both kinds of service continue to be called ''train employees[,]'' and the term ''train employee'' continues to be defined, for the purposes of both sets of applicable requirements, as an individual engaged in or connected with the movement of a train.

Congress could have separately created the terms ''freight train employee'' and ''passenger train employee'' and defined the new terms to make clear that covered service as one kind of train employee does not count as covered service for the other kind of train employee. Similarly, Congress could have amended Sec. 21103(b)(2) and (3) by inserting ''freight'' in front of ''train'' to narrow the time counted toward ''time on duty'' for purposes of Sec. 21103(a). Likewise, Congress also could have written the language of Sec. 21103(a)(4) to limit it expressly, so that it only applied to initiating an on-duty period as a freight train employee, or as a train employee subject only to the requirements of this section in the particular duty tour. Congress did not do any of these. For that matter, Congress did not even expressly limit the language of Sec. 21103(a)(4) to initiating an on-duty period as a train employee, though FRA does so limit the provision for the purposes of this interim interpretation, for the reasons described in this Section III.C.2.b–c.

By contrast, in the RSIA, Congress amended the definition of ''signal employee,'' so that it no longer applied only to railroad employees performing the functions of a signal employee. See Sec. 108(a) of the RSIA and Sec. 21101(4). However, the definition of ''train employee'' in the very next paragraph of the statute was not changed, and no distinction was created functionally between train employees in freight or passenger service. See 49 U.S.C. 21101(5). Each is still simply called ''train employee[,]'' and that term should be interpreted to mean the same thing in all places that it is used in the statute, and the provisions applicable to that type of employee must apply to all employees so defined.

In addition, the functional approach to determining when an individual becomes a covered service employee of one form or another means that the individual is a passenger train employee for purposes of the Passenger Train Employee HS Regulations only during those periods of time within which he or she is a train employee who is engaged in commuter or intercity rail passenger transportation, as detailed in 49 CFR 228.405(b) (''Determining time on duty), e.g., being engaged in or connected with the movement of a train, including being a hostler, providing

commuter or intercity rail passenger transportation. Note that under 49 CFR 228.405(b)(3) periods spent performing other types of covered service and noncovered service count as on-duty time as a passenger train employee if they occur in the same duty tour as passenger-train-employee covered service.

However, Sec. 21102(c)(3)(B) exempts railroads from compliance with Sec. 21103 for ''train employees with respect to the provision of commuter rail passenger transportation or intercity rail passenger transportation''; i.e., passenger train employees. Therefore, individuals are subject to the Sec. 21102(c)(3)(B) exemption only while they are performing covered service as a passenger train employee. Any individual who is not a train employee who is engaged in commuter or intercity rail passenger transportation is not subject to the Sec. 21102(c)(3)(B) exemption. Because Sec. 21102(c)(3)(B) exempts railroads from compliance with Sec. 21103 with respect to all passenger train employees, an individual who is subject to Sec. 21103 is necessarily not within the scope of the exemption provided by Sec. 21102(c)(3)(B) and is not a passenger train employee at the time when the individual is subject to Sec. 21103.

Because any individual who is subject to Sec. 21103 is not subject to Sec. 21102(c)(3)(B), the distinction between service as a passenger train employee and freight train service is irrelevant when applying Sec. 21103. The text of Sec. 21103 makes no distinction between freight trains and passenger trains. Recalling that the definitions in Sec. 21103(b)(2) and (3) of ''time on duty'' for purposes of Sec. 21103(a)(4) are phrased in the present tense and that all limitations of Sec. 21103(a) are phrased in the equivalent of the present tense, with prior conduct discussed in the present perfect tense, the appropriate frame of reference for determining whether Sec. 21103(a)(4) precludes the employee from being on duty is the time when the employee seeks to go on duty, including only those exemptions or exclusions that apply to the employee at that moment. Therefore, when an employee reports for duty as a freight train employee subject to Sec. 21103, any prior time on duty ''engaged in or connected with the movement of a train,'' regardless of whether it was as a passenger train employee or freight train employee, is counted when determining whether Sec. 21103(a)(4) precludes the employee from being on duty.

When a railroad seeks to determine whether an employee is permitted to remain or go on duty with respect to the limitation of Sec. 21103(a)(4), the determination of whether the employee has initiated an on-duty period on each of the prior 6 or more consecutive days is made within the context of Sec. 21103(b), which defines what constitutes ''time on duty.'' Sec. 21103(b)(2) includes any time ''engaged in or connected with the movement of a train'' to be ''time on duty.'' Duty tours as a passenger train employee include some time ''engaged in or connected with the movement of a train,'' and are therefore time on duty under Sec. 21103(b)(2). Although those duty tours are exempt by Sec. 21102(c)(3)(B) from the limits and requirements of Sec. 21103 at the time when the duty tours occur, an employee subject to Sec. 21103 is no longer subject to that exemption, as discussed above. Thus, at the moment that a railroad or a train employee looks back to see whether the employee may be required or allowed to go on duty as a freight train employee, the employee's assignment is to work as a freight train employee, and in looking back at the employee's prior duty tours, should view them as subject to, rather than exempt from, Sec. 21103, even if some of the duty tours involved service engaged in or connected with the movement of a passenger train.

In the context of determining whether the individual has initiated an on-duty period each day on prior consecutive days, ''time the employee is engaged in or connected with the movement of a train is time on duty.'' Sec. 21103(b)(2). Since time on duty as a passenger train employee is unequivocally time ''engaged in or connected with the movement of a train,'' and, as discussed above, the statute does not differentiate between time spent engaged in or connected with the movement of a passenger train from time spent engaged in or connected with the movement of a freight train, on-duty periods including train service providing commuter or intercity rail passenger transportation constitute on-duty periods for the purpose of Sec. 21103(a)(4).

In addition to maintaining fidelity both to the statutory language and to FRA's functional approach to applying the HS laws, the principle of including on-duty periods in passenger-train-employee covered service within the scope of Sec. 21103(a)(4) avoids the safety risks resulting from allowing an individual to initiate an on-duty period as a train employee each day for an indefinite number of days without triggering the consecutive-days limitation, simply because he or she occasionally initiates an on-duty period as a passenger train employee instead of as a freight train employee.

FRA's interim interpretation is also consistent with both informal guidance FRA has provided on this question and FRA's response to an AAR comment on FRA's notice of proposed rulemaking on passenger train employee hours of service, in which AAR suggested that train employees employed by freight railroads who may occasionally perform service as a passenger train employee should be covered only by Sec. 21103, and should be excluded from the scope of FRA's regulation. See comments of AAR, Docket No. FRA–2009–0043. FRA declined AAR's suggestion to extend the work train and pilot exceptions for train employees employed by freight railroads to all train employees employed by freight railroads,[31] believing that train employees engaged in or connected with commuter or intercity rail passenger transportation should be covered by its regulation, regardless of the nature of the railroad by which the employee is employed. FRA's decision in the rulemaking was based in part on the same policy concerns just discussed, the need to protect an individual who sometimes performs freight train employee service and sometimes performs passenger train employee service, from the safety risks of cumulative fatigue. Under this interim interpretation, employees performing both kinds of service are subject to both sets of requirements, as appropriate. For employees who perform duty tours both as a passenger train employee and as a freight train employee, it is necessary for railroads to track both types of duty tours and perform the appropriate consecutive-days limitation analyses to determine whether the employee may legally be required or allowed to go on duty in a particular kind of service. The analyses are separate: only the freight consecutive-days limitation analysis (Sec. 21103(a)(4)) must be applied to determine if an employee may report for duty as a freight train employee, and only the passenger consecutive-days limitation analysis (49 CFR 228.405(a)(3)) must be performed to

[31] FRA's definition of ''Train employee who is engaged in commuter or intercity rail passenger transportation'' excludes a train employee of a freight railroad ''who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation, and a train employee of'' a freight ''railroad who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad.'' 49 CFR 228.403(c).

determine if an employee may report for duty as a passenger train employee.[32]

e. Further Clarification: Service as a Passenger Train Employee Is Within the Scope of the Calendar Monthly Limits Set by Sec. 21103(a)(1) and (c)(1)

As previously noted in passing in the discussions above, FRA wishes to highlight that, like subsection (a)(4) of Sec. 21103 and for similar reasons,[33] other provisions of Sec. 21103 count toward their respective limitations or requirements, appropriate periods of time accrued during passenger-train-employee duty tours and related activity. Some of these limitations apply to a calendar month, and some of the limitations and requirements apply to a single duty tour.

In particular, the monthly limitations are Sec. 21103(a)(1) (limiting the combined total of time on duty, time spent awaiting or in deadhead transportation from a duty assignment to the point of final release, and time spent in any other mandatory service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month). FRA does not, however, expect the cumulative monthly limitations of either Sec. 21103(a)(1) or Sec. 21103(c)(1) to be reached in fact for individuals who sometimes serve as passenger train employees, based on the existing nature of such duty tours. Additionally, a railroad could violate Sec. 21103(c)(1) with respect to a particular employee only at a time when that employee was subject to Sec. 21103(c)(1); i.e., during a duty tour including service as a freight train employee. If an employee reaches more than 30 hours of time countable towards the 30-hour monthly limitation during a passenger train employee duty tour, and proceeds to go on duty only as a passenger train employee for the rest of the calendar month, then no violation of Sec. 21103(c)(1) has occurred.

[32] The passenger train employee consecutive-days limitation analysis depends on the type of the assignments performed on each of the consecutive days. A *Type 1 assignment* means an assignment that requires the employee to report for duty no earlier than 4 a.m. on a calendar day and be released from duty no later than 8 p.m. on the same calendar day. Any other assignment is Type 2, except that a Type 2 assignment may be considered a Type 1 assignment if it is analyzed and shown to not pose an excess risk of fatigue and does not require the employee to be on duty for any period of time between midnight and 4 a.m. See 49 CFR 228.5; see also 76 FR 50360 (Aug. 12, 2011).

[33] In addition, of course, any mandatory service for the railroad (not just passenger train employee service or freight train employee service) counts toward the 276-hour monthly maximum set by Sec. 21103(a)(1), but passenger train employee service counts as time ''on duty'' for purposes of Sec. 21103(a)(1)(i).

f. Further Clarification: Requirements for Rest Set by Sec. 21103(a)(3), (c)(4), and (e), After a Single Duty Tour That Includes Service as a Freight Train Employee, Must Also Be Met Before Performing Any Service for the Railroad or Else the Additional Service Will Commingle

Statutory requirements for minimum amounts of undisturbed rest apply only to performing a single duty tour that includes at least some service as a freight train employee. These requirements are the following: (1) Sec. 21103(a)(3) (which requires that an individual have had 10 consecutive hours off duty in the 24 hours prior to remaining or going on duty as a freight train employee); (2) Sec. 21103(c)(4) (additional rest requirement) (which requires extra time off duty in addition to the 10 consecutive hours for freight train employees after reaching more than 12 consecutive hours of combined time on duty and time waiting for or in deadhead transportation to the point of final release); and (3) Sec. 21103(e) (which requires that these off-duty periods be free from communication that could reasonably be expected to interrupt the freight train employee's rest (free from communication)).

Of course, a duty tour as a passenger train employee that did not include covered service as a freight train employee would not trigger the requirement for 10 consecutive hours off duty unless the employee had been on duty for 12 consecutive hours, in which case 10 consecutive hours off duty would be required under the Passenger Train Employee HS Regulations at 49 CFR 228.403(a)(2), not because of Sec. 21103(a)(3). Likewise, a duty tour as a passenger train employee that did not include covered service as a freight train employee would not trigger the requirement that the off-duty period be free from communication, or the requirement for additional rest. However, if the rest requirement of Sec. 21103(a)(3) for 10 consecutive hours off duty and the requirement of Sec. 21103(e) that the rest period be free from communication are triggered by a duty tour that included covered service as a freight train employee, then the statutory minimum off-duty period following that duty tour must comply with those requirements before the employee performs any other service for the railroad, or else the subsequent service for the railroad will commingle, even if that subsequent service does not include covered service as a freight train employee. See Sec. 21103(b)(3).[34] Likewise, if the additional rest requirement is triggered by a duty tour that included covered service as a freight train employee that encompasses a total of more than 12 hours of time on duty and time waiting for or in deadhead transportation, then the statutory minimum off-duty period following that duty tour must also include the additional rest prior to the employee performing any other service for the railroad, even if that subsequent service does not include covered service as a freight train employee.

g. Further Clarification: Single Duty Tours Performing Multiple Types of Covered Service

The longstanding statutory provisions regarding commingled service (Sec. 21103(b)(3), Sec. 21104(b)(2), and Sec. 21105(c)) and the more recent regulatory provision regarding commingled service (49 CFR 228.405(b)(3)), respectively, continue to govern a duty tour in which an individual performs the duties of a freight train employee, signal employee, dispatching service employee, or passenger train employee, respectively. For example, any time spent performing service for a railroad that is not separated by at least 10 uninterrupted hours off duty from subsequent service defined as ''time on duty'' by Sec. 21103(b) is commingled service under Sec. 21103(b)(3), because it occurs within the same ''24-hour period'' as the covered service subject to Sec. 21103(b). As a result, a duty tour as a passenger train employee that is followed by a duty tour as a freight train employee must be separated by at least 10 uninterrupted hours off duty to avoid their commingling. If the duty tour as a freight train employee triggers Sec. 21103(c)(4)'s additional uninterrupted rest requirement, that additional rest must also be completed before the employee next reports for duty as a passenger train employee in order to avoid the possible commingling of the subsequent duty tour as a passenger train employee with the prior triggering duty tour as a freight train employee.

FRA requests comment on the implications of its interim interpretation of Sec. 21103(a)(4) on other provisions of Sec. 21103. As a result of adopting the narrower interpretation, excluding

[34] Sec. 21103(b)(3) reads as follows: ''(b) Determining time on duty.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply: * * * (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train time is time on duty.''

signal-employee covered service and dispatching-service-employee covered service for the purposes of the consecutive-days limitation, FRA views duty tours containing only signal-employee covered service or dispatching-service-employee covered service as equivalent to periods that are neither time on duty nor time off duty for purposes of Sec. 21103(a)(4), where the individual is performing non-covered service. For example, if an employee were to report for duty each day from 9 a.m. to 5 p.m. Monday through Saturday, with Monday's through Wednesday's time on duty including train-employee covered service and Thursday's through Saturday's time on duty not including train-employee covered service but including signal-employee covered service, that employee would not have triggered the ''consecutive-days'' limitation and could lawfully report again at 9 a.m. on Monday. FRA recognizes that Congress identified signal-employee covered service and dispatching-service-employee covered service as fatiguing; however, these forms of covered service do not constitute time on duty for the purposes of Sec. 21103 unless they commingle with train-employee covered service as provided in Sec. 21103(b)(3), and therefore, employees who perform these functions, but do not perform covered service as a train employee during the same duty tour, are not considered to have initiated on-duty periods for the purposes of the ''consecutive-days'' limitation.

If an employee performs multiple types of covered service in a single duty tour, including train-employee covered service, the time spent by the employee in carrying out functions other than covered service as a train employee is ''[t]ime spent performing other service for the railroad during a 24-hour period in which the employee is engaged in or connected with the movement of a train,'' which, in turn, is defined as ''time on duty'' for purposes of Sec. 21103 by Sec. 21103(b)(3). As a result, this time spent in service for the railroad other than train-employee covered service is defined by Sec. 21103(b)(3) as ''time on duty'' for purposes of Sec. 21103(a) and, therefore, counts as initiating an on-duty period for the purposes of Sec. 21103(a)(4). Performing signal-employee covered service or dispatching-service-employee covered service, which brings the employee under Sec. 21104 or Sec. 21105, respectively, during the performance of the particular type of service, does not negate the train-employee covered service also performed by the employee.

In the case of dispatching-service-employee covered service, Sec. 21105(a) provides that it applies, rather than Sec. 21103 or Sec. 21104, ''during any period of time the employee is performing duties of a dispatching service employee.'' At ''a tower, office, station, or place at which at least 2 shifts are employed, an individual performing dispatching service may not be required or allowed to remain or go on duty for more than a total of 9 hours during a 24-hour period.'' Sec. 21105(b)(1). At a one-shift location, such an individual is limited to a total of 12 hours on duty during a 24-hour period. Sec. 21105(b)(2). Unlike the 24-hour period relevant for the statutory provisions governing train employees and signal employees, Sec. 21105(b)'s ''24-hour period'' does not reset after an individual has had a certain amount of rest and then reports to perform duty governed by the section. Instead, Sec. 21105(b)(1) requires a continuous look back during the dispatching service employee's duty tour to determine whether the individual has been on duty for a total of 9 hours in any 24-hour period.

FRA does not interpret Sec. 21105(a) literally as an exemption from Sec. 21103 and Sec. 21104 with respect to periods of time performing the duties of a dispatching service employee and periods of time performing other service for the railroad within a 24-hour period in which the duties of a dispatching service are performed. Rather, FRA interprets Sec. 21105(a) as establishing an extra set of limitations that must be met, in addition to the limitations and requirements imposed by any other applicable HS requirement. The following two examples illustrate this interpretation.

Example 1

Facts: Individual X has been off duty Saturday and Sunday and then goes on duty as a dispatching service employee at a 2-shift tower at 12 noon on Monday and works for 4 hours, is then off duty for 12 hours, and finally reports for duty at 4 a.m. on Tuesday as a freight train employee.

Effect of law: Individual X may report and work as a freight train employee for only 5 hours prior to noon on Tuesday, for a grand total of the maximum 9 hours of service under Sec. 21105, without violating Sec. 21105, because X's service as a freight train employee commingles with his or her dispatching service. Note that X may report and work as a freight train employee at all only if during the 12 hours off duty, at least 10 consecutive hours were uninterrupted by communications from the railroad that could reasonably be expected to disrupt that rest (see Sec. 21103(e)) and if no other limitation or requirement in Sec. 21103 is violated (e.g., the 276-hour monthly maximum and the consecutive-days provision). After 4 p.m. on Tuesday, X's subsequent service is no longer within any 24-hour period that would include any of his or her time spent as a dispatching service employee from 12 noon to 4 p.m. on Monday, and is no longer limited to only 9 hours of time on duty for the remainder of his or her duty tour as a freight train employee.

Example 2

Facts: Individual Y returns from a long vacation, goes on duty as a freight train employee for 8 hours, and then immediately reports as a dispatching service employee at a 2-shift tower.

Effect of law: Individual Y may work at the 2-shift tower as a dispatching service employee for only one hour without violating Sec. 21105 because Y's 8 hours working as a freight train employee must be added to the 1 hour Y worked as a dispatching service employee. After working a total of 9 hours in a 24-hour period, Y has reached the Sec. 21105(b)(1) maximum of 9 hours on duty in a 24-hour period in a tower with 2 or more shifts.

Once the rest requirement of Sec. 21103(a)(4) is triggered because a duty tour includes performance of freight-train-employee functions to which the limitations of Sec. 21103 apply, the rest requirement of the consecutive-days limitation does not prevent an individual from lawfully reporting for covered service to which Sec. 21103 does not apply, or for noncovered service. When an individual's duty tour does not include his or her performance of freight-train-employee functions, that individual is not subject to Sec. 21103 during the duty tour, and, therefore, the consecutive-days limitation of Sec. 21103(a)(4) does not apply to the duty tour and prevent the individual from lawfully performing such other service.

On the other hand, in duty tours subject to multiple sections of the HS laws or the Passenger Train Employee HS Regulations, each of the applicable sections applies to the entire duty tour, due to commingled-service provisions, and a railroad must comply with all of the provisions applicable to a given duty tour. In particular, the consecutive-days limitation of Sec. 21103(a)(4) applies to such duty tours if those duty tours contain any time in which the employee is engaged in or connected with the movement of a train, whether

as a passenger train employee or as a freight train employee. Although both the dispatching-service-employee provision (Sec. 21105) and the Passenger Train Employee HS Regulations contain applicability sections, these applicability sections state that the substantive provision applies only to the time when the individual is performing a function of a dispatching service employee or a passenger train employee, respectively, including times in other service for the railroad that commingle during the single tour of duty, as noted above.[35] Section 21105(a) states that it applies ''during any period of time the employee is performing duties of a dispatching service employee,'' and 49 CFR 228.413, the regulatory exemption from Sec. 21103 for passenger train employees, states that the exemption applies with respect to ''train employees who *are* engaged in commuter or intercity rail passenger transportation.'' Emphasis added. In other words, if an individual's duty tour includes multiple types of covered service, the railroad must comply with all of the limitations and requirements applicable to each type of covered service throughout the duty tour.

Longstanding guidance from FRA in the context of commingled service during a single duty tour provides that ''[w]hen an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty time.'' 49 CFR part 228, app. A, ''Commingled Service.'' Although this principle requires compliance with the most exacting and stringent of the applicable standards, the principle in effect ensures compliance with all of the HS provisions applicable to the service performed because complying with the most stringent standard will prevent violation of the less stringent standards, thus resulting in compliance with all of the HS provisions applicable to the service performed. Consistent with that traditional guidance, the interim interpretation maintains that when an employee performs service governed by more than one HS requirement for the minimum amount of off-duty time, the most generous provision determines the total amount of required off-duty time. Similarly, when an employee performs service covered by one provision that requires that the off-duty time be uninterrupted (i.e., Sec. 21103(e)) and other service covered by a provision that does not require that the off-duty time be uninterrupted, the higher standard determines whether the off-duty time be uninterrupted. FRA's interim interpretation maintains the underlying principle of applying to the service in question all relevant sections of the HS laws and the Passenger Train Employee HS Regulations and requiring compliance with the most stringent of those relevant sections.

h. More Examples of the Application of the Statutory or the Regulatory Consecutive-Days Provision, or Both, to a Single Duty Tour or to Several Duty Tours Involving Performance of One or More Types of Covered Service

The following additional examples illustrate the application of principles for interpreting Sec. 21103(a)(4) and the consecutive-days provision of the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)) that have been discussed above in this Section III.C of this document.

Example 3

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday, performing only signal-employee or dispatching-service-employee covered service each day.

Effect of law: On Sunday, the individual has zero prior consecutive days counted for the purpose of Sec. 21103(a)(4) and, therefore, may report for duty as a freight train employee without violating Sec. 21103(a)(4).

Example 4

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday, performing both signal-employee covered service, or dispatching-service-employee covered service, and freight-train-employee covered service in a single duty tour each day.

Effect of law: On Sunday, the individual has initiated an on-duty period each day for six consecutive days for the purpose of Sec. 21103(a)(4), and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. On Sunday, the individual may report for duty to perform signal-employee or dispatching-service-employee covered service, without violating Sec. 21103(a)(4), but he or she is nonetheless required to have had the 48 hours of time off duty at the employee's home terminal under Sec. 21103(a)(4) before next performing freight-train-employee covered service subject to Sec. 21103.

Example 5

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday performing passenger-train-employee covered service each day and is finally released at 6:00 p.m.

Effect of regulations and law: On Sunday, the individual has initiated an on-duty period each day for six consecutive days for the purpose of Sec. 21103(a)(4), and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. However, a duty tour as a passenger train employee is subject to the Passenger Train Employee HS Regulations. Those regulations impose two requirements. First, the regulations require that the employee have had at least 8 consecutive hours off duty before going on duty as a passenger train employee. Second, the regulations include a provision that addresses cumulative fatigue in a somewhat different way than Sec. 21103(a)(4). Here, because the individual's duty tours as a passenger train employee did not include any Type 2 assignments (duty tours including any time on duty between 8 p.m. and 4 a.m. that either include time on duty between 12:00 a.m. and 4:00 a.m. or have not been analyzed and shown to not pose an excess risk of fatigue), they did not trigger the rest requirement of the consecutive-days limitation in the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)). Accordingly, the individual may be required or allowed to report for duty as a passenger train employee.

Example 6

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Wednesday, performing freight-train-employee covered service each day until 8 p.m., and then the individual reports for duty at 8:00 a.m. each day Thursday through Saturday, performing only dispatching-service-employee covered service each day until 5 p.m.

Effect of law: On Sunday, the individual has initiated an on-duty period for zero prior consecutive days counted for the purpose of Sec. 21103(a)(4), and may perform freight-train-employee covered service without violating Sec. 21103(a)(4).

[35] In addition, as discussed above, even a duty tour containing only service as a passenger train employee would count toward the consecutive-day limitation of Sec. 21103(a)(4).

Example 7

Facts: An individual reports for duty at 9:00 a.m. each day Monday through Wednesday performing passenger-train-employee covered service for eight hours each day (with final release at 5:00 p.m.), and then reports for duty at 9:00 a.m. each day Thursday through Saturday performing freight-train-employee covered service for eight hours each day (with final release at 5:00 p.m.).

Effect of regulations and law: For the purposes of determining whether the individual may report for duty on Sunday as a freight train employee without violating Sec. 21103(a)(4), the individual has initiated an on-duty period for six consecutive days, and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. For the purposes of determining whether the individual may report for duty on Sunday as a passenger train employee, the individual has initiated an on-duty period for six consecutive calendar days. However, because these on-duty periods do not include any Type 2 assignments (duty tours including any time on duty between 8 p.m. and 4 a.m. that either include time on duty between 12:00 a.m. and 4:00 a.m. or have not been analyzed and shown to not pose an excess risk of fatigue), the individual may report for duty on Sunday as a passenger train employee without violating the consecutive-days provision of the Passenger Train HS Regulations.

Example 8

Facts: An individual reports for duty at 9:00 a.m. each day Monday through Wednesday performing passenger-train-employee covered service for eight hours each day (with final release at 5:00 p.m.), and then reports for duty at 1:00 p.m. each day Thursday through Saturday performing freight-train-employee covered service for eight hours each day (with final release at 9:00 p.m.).

Effect of regulations and law: For the purposes of determining whether Sec. 21103(a)(4) prohibits the railroad from requiring or allowing the individual to report for duty on Sunday as a freight train employee, the individual has initiated an on-duty period for six consecutive days and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. For the purposes of determining whether the railroad may require or allow the individual to report for duty on Sunday as a passenger train employee without violating Sec. 21103(a)(4), the individual has initiated an on-duty period for six consecutive calendar days. Because several of these on-duty periods included duty tours with time on duty between the hours of 8 p.m. and 4 a.m. and the duty tours were not analyzed and shown not to pose an excess risk of fatigue, the individual has initiated an on-duty period for six consecutive days including one or more Type 2 assignments. As a result, the employee must have 24 hours of time off duty and free from any service for any railroad before next reporting for duty as a passenger train employee.

Example 9

Facts: An individual reports for duty each day at 8 a.m. for 8 hours of service as a passenger train employee, with the duty tour ending at 4 p.m., beginning on Monday, for 5 consecutive days, ending on Friday. On Saturday, the individual reports for duty at 6 p.m. for 8 hours of service as a freight train employee, with the duty tour ending at 2 a.m. on Sunday.

Effect of regulations and law: For the purposes of determining whether the individual may report for duty on or after 2 p.m. on Sunday, as a freight train employee, the individual has initiated an on-duty period for one prior consecutive day, and may report for duty to perform freight-train-employee covered service without violating Sec. 21103(a)(4). Specifically, because the individual was off duty for 26 hours between Friday at 4 p.m. and Saturday at 6 p.m., and 24 hours of time off duty is sufficient to end a series of consecutive days for Sec. 21103(a)(4), the duty tours prior to Saturday are not consecutive to the Saturday duty tour. For the purposes of determining whether the individual may report for duty on or after 2 p.m. on Sunday as a passenger train employee, the individual has initiated an on-duty period each day for 6 consecutive calendar days, including one Type 2 assignment–the Saturday duty tour, which extended into the hours between midnight and 4 a.m. and is therefore necessarily Type 2 regardless of any fatigue analysis that could have been performed on an assignment including the Saturday duty tour. As a result, the individual must have had at least 24 hours of time off duty and free from any service for any railroad before next reporting for duty as a passenger train employee.

D. Under Sec. 21103(a)(4), a Railroad May Not Require or Allow a Train Employee To Initiate an On-Duty Period After the Employee Has Initiated an On-Duty Period Each Day for Six Consecutive Days Followed By More Than 24 Hours Off Duty at the Away-From-Home Terminal. Following Such Service, When That Employee Returns to the Home Terminal, the Employee Must Remain Unavailable for Service at the Home Terminal for at Least 48 Hours

1. Summary of Issue and Interim Interpretation

Under Sec. 21103(a)(4), the railroad may not require or allow a train employee to initiate an on-duty period after the employee has an initiated an on-duty period each day for six consecutive days, has been finally released at the away-from-home terminal, and then has spent more than 24 hours off duty there. Rather, the railroad may require or allow the employee to engage in non-covered service at the away-from-home terminal, if desired, but must deadhead the employee to his or her home terminal and must then give the employee 48 consecutive hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform service as a freight train employee. If the railroad has required or allowed the employee to initiate an on-duty period at the away-from-home terminal after the seventh consecutive day, then railroad must give the employee 72 hours off duty before requiring or allowing the employee to report for duty again to perform service as a freight train employee.

2. Detailed Discussion of Interim Interpretation

When a train employee initiates an on-duty period each day for six consecutive days and the final period of on-duty time ends at the away-from-home terminal, Sec. 21103(a)(4)(A)(i) permits the employee to ''work a seventh consecutive day.'' Emphasis added. In the event that a railroad takes advantage of this allowance and has its employee work on a seventh consecutive day, Sec. 21103(a)(4)(A)(ii) requires that ''any employee who works a seventh consecutive day pursuant to subparagraph (i) shall have 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 carrier.'' FRA

has not previously addressed the question of whether an employee may initiate a seventh on-duty period 24 hours or more [36] after the employee is finally released from his or her sixth consecutive duty tour, or if Sec. 21103(a)(4)(A)(i)–(ii) only authorizes a train employee to initiate an on-duty period that is consecutive to the sixth consecutive day.

The structure of Sec. 21103(a)(4) generally prohibits a train employee from remaining on duty or going on duty after the employee has initiated on-duty periods for six consecutive days, until the employee has at least 48 hours of time off duty at the home terminal unavailable for any service for any railroad. Sec. 21103(a)(4)(A) provides an exception to this general prohibition in subsection (a)(4)(A)(i), allowing an employee to initiate an on-duty period [37] on a ''seventh consecutive day.'' Subsection (a)(4)(A)(ii) requires that ''any employee who works a seventh consecutive day pursuant to subparagraph (i)'' have, instead of 48 hours, 72 hours of time off duty at the home terminal during which the employee is unavailable for any service for any railroad. Similarly, subsection (a)(4)(B) allows employees to initiate on-duty periods on seven consecutive days under collective bargaining agreements or authorized pilot programs; these employees must also have 72 hours of time off duty at the home terminal unavailable for any service for any railroad. Outside of these two exceptions, there is a violation of Sec. 21103(a)(4) if the railroad requires or allows a train employee to initiate an on-duty period after having required or allowed the employee to do so on six prior consecutive days and before having given the employee the 48 hours of time off duty.

FRA is aware that some railroads have scheduled employees to initiate on-duty periods each day for six consecutive days followed by more than a day spent off duty at the away-from-home terminal, and then, after the employee initiates an additional on-duty period and returns to his or her home terminal, have allowed the employee to initiate a new on-duty period after having only 48 hours off duty at the home terminal. Such a practice is plainly inconsistent with the language of the statute; as discussed above, any allowance that the statute provides for an employee to initiate an on-duty period after having already done so on six consecutive days is contingent upon that employee's receiving 72 hours of time off duty after the employee is finally released at the home terminal from the additional on-duty period that is allowed under one of the exceptions to the general six-day limitation. Specifically, when an employee is at the away-from-home terminal at the end of the duty tour initiated on the sixth consecutive day, he or she is permitted to initiate an on-duty period on ''the seventh consecutive day'' under Sec. 21103(a)(4)(A)(i), and an employee who initiates an on-duty period on this seventh consecutive day pursuant to that section must have the 72 hours of time off duty required by Sec. 21103(a)(4)(A)(ii) after the employee is finally released from the duty tour initiated on the seventh consecutive day. However, this does not resolve the question of what period of time constitutes ''the seventh consecutive day.''

Because the exception of paragraphs (a)(4)(A)(i) and (ii) discusses the additional on-duty period in the context of ''a seventh consecutive day,'' a literal reading of the statute, which FRA is adopting, would preclude the initiation of an on-duty period by an employee who had done so for six consecutive days, ending the final on-duty period at the away-from-home terminal, but did not initiate another on-duty period until more than 24 hours later, because at that time the initiation of the on-duty period would no longer fall on the ''seventh consecutive day.'' Under FRA's limited interpretation, after 24 hours at the away-from-home terminal (or more than a calendar day at the away-from-home terminal for a railroad that had not yet transitioned to FRA's final interpretation of ''day''), the authority of the railroad to require or allow an employee to initiate an on-duty period as a train employee under subsection (a)(4)(A)(i) disappears. As a result, the railroad's only choice in this circumstance would be that the employee must be deadheaded to his or her home terminal and receive at least 48 hours free from any service for any railroad before next initiating an on-duty period, though the employee could perform non-covered service before receiving the 48 hours of time off duty. Although this construction of the subsection has the virtue of hewing closely to the express terms of the statute, it results in the odd outcome that a railroad loses the authority to require or allow an employee to perform covered service because the employee has been off duty for too long.

FRA considered but rejected an alternative reading of the text that would avoid this incongruous result by understanding the authorization to ''work a seventh consecutive day'' as allowing one final initiation of an on-duty period when the employee ends the sixth consecutive on-duty period at the away-from-home terminal. This final on-duty period would generally be initiated within the seventh consecutive day, but in unusual circumstances where the employee remained off duty at the away-from-home terminal for more than 24 hours (or more than a calendar day for a railroad that had not yet transitioned to FRA's final interpretation), the final on-duty period would be authorized despite falling outside of the 24 hours (or calendar day) that constitute the seventh consecutive day. However, adoption of this alternative interpretation would have raised new questions concerning the time spent at the away-from-home terminal. Under that rejected reading, an employee could lawfully remain at the away-from-home terminal to engage in non-covered service for several days before next initiating an on-duty period, and the alternative broader interpretation would require determining whether this non-covered service would preclude subsequent covered service before having the required 48 hours of time off duty.

Although both of these interpretations are reasonable constructions of the statute given the nature of railroad operations, FRA views the limited interpretation, where an employee is not permitted to initiate an on-duty period after the end of the seventh consecutive day, as superior. In addition to being a more direct construction of the text of the statute, and providing more clarity to railroads and employees, the limited interpretation avoids the question of what, if any, non-covered service would be permitted between the sixth consecutive on-duty period and the final on-duty period, which could occur beyond the seventh consecutive day. Under the limited interpretation, an employee may engage in non-covered service separate from a duty tour at the away-from-home terminal after initiating an on-duty period on six consecutive days, but may not initiate a seventh duty tour prior to having the 48 hours of time off duty at the home terminal unless the duty tour is initiated within 24 hours, of the employee's final release from the duty tour initiated on the sixth consecutive day. Under the interpretation of ''day'' as a 24-hour period (24-hour-day interpretation), this non-covered service is necessarily limited to four hours if it is to avoid commingling with either the duty tour

[36] See Final Interpretations, 77 FR 12417–19 (defining ''day'' in this context to refer to a 24-hour period).

[37] See Final Interpretations, 77 FR 12419 (interpreting ''work'' in this context to refer to the initiation of an on-duty period).

initiated on the sixth consecutive day or the duty tour that follows the non-covered service on the seventh consecutive day, since there must be at least 10 hours of time off duty between the non-covered service and the duty tours before and after the non-covered service, and the duty tour following the non-covered service must be initiated 24 hours or less after the employee's final release from the duty tour initiated on the sixth consecutive day, for the seventh duty tour to be consecutive to it. As an example, if an employee were finally released at midnight, the following duty tour would have to begin prior to midnight of the following day in order to be on a consecutive day. In order to avoid commingling with both the prior and subsequent duty tours, the non-covered service must fall between 10 a.m., 10 hours after the midnight final release, and 2 p.m., 10 hours prior to the subsequent initiation of the on-duty period. This leaves only four hours of time for non-covered service outside of both duty tours; any greater amount of service would either commingle with the prior duty tour, commingle with the subsequent duty tour, or cause the subsequent duty tour to be initiated outside of the 24 hours that constitutes the ''seventh consecutive day.''

FRA seeks comment on the impact of this interpretation on railroad operations. Commenters arguing in favor of the broader interpretation, allowing for the initiation of an on-duty period under Sec. 21103(a)(4)(A)(i) more than 24 hours (or more than a calendar day for a railroad that had not yet transitioned to FRA's final interpretation), after the employee's final release from the duty tour initiated on the sixth consecutive day, are encouraged to discuss potential resolutions for the issue of intervening non-covered service separated from a duty tour.

IV. Application of the ''Signal Employee Exclusivity'' Provision to Individuals Who Drive Commercial Motor Vehicles for the Purpose of Themselves Installing, Maintaining, or Repairing Signal Systems

A. Summary of Issue and Interim Interpretation

The ''signal employee exclusivity'' provision, which was added by the RSIA and codified at Sec. 21104(e) (exclusivity provision), reads as follows:

> The hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by this chapter. Signal employees operating motor vehicles shall not be subject to any hours of service rules, duty hours or rest period rules promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.

FRA has previously explained that there is no gap between the statutory HS limitations with respect to the installation, repair, and maintenance of signal systems, which are administered by FRA, and the regulatory HS limitations with respect to the operation of commercial motor vehicles, which are promulgated and administered by FMCSA. Final Interpretations, 77 FR at 12427–28. However, FRA's prior discussion of the issue allowed FMCSA's HS regulations (49 CFR part 395) (FMCSA's HS Regulations) to reach employees who generally performed signal covered service and were, therefore, generally considered ''signal employees'' on the occasions when those employees were driving a commercial motor vehicle during a period of time that was not within a duty tour that included any time spent performing covered service as a signal employee.

Both labor organizations and railroad industry organizations have identified the potential application of FMCSA's HS Regulations, including cumulative limitations that could reach into duty tours that are clearly governed by the FRA-enforced statutory HS limitations.[38] Although FRA previously interpreted the exclusivity provision in light of the definition of ''signal employee'' as ''an individual who is engaged in installing, repairing, or maintaining signal systems'' in Sec. 21101(4), FRA did not previously consider reinterpreting the definition of ''signal employee'' in light of the new exclusivity provision.

Now construing the whole statute, in accordance with traditional canons of statutory interpretation, FRA views the exclusivity provision as broadening the scope of what activity is denoted by the words ''engaged in installing, repairing, or maintaining signal systems.'' Specifically, as described in detail below, FRA views an individual's operation of a motor vehicle for the purpose of allowing that individual to install, repair, or maintain signal systems to be a function that is time on duty under the ''signal employee'' provisions of the HS laws, regardless of whether the operation of the motor vehicle is within the same duty tour as the direct work on the signal system, or is separated from it by at least 10 hours off duty. As a result, that operation of a motor vehicle for that purpose is itself subject to the limitations of the HS laws and to the exclusivity provision that exempts the operation from other Federal requirements concerning hours of service, duty hours, or rest periods, including FMCSA's HS Regulations.

It is important to note that this interpretation does not affect FRA's preexisting interpretations governing a signal employee's commuting time (i.e., time spent commuting by motor vehicle between the signal employee's residence and his or her headquarters), which remains classified as time off duty for purposes of Sec. 21104. In addition, as provided by Sec. 21104, travel time returning from a trouble call or an outlying work site to the employee's headquarters or residence at the end of a duty period, remains neither time on duty nor time off duty (except where such time is in transportation in an on-track vehicle). FRA seeks comment on this interim interpretation.

B. Detailed Discussion of Issue and Interim Interpretation

In response to the June 2009 Interim Interpretations, the Brotherhood of Railroad Signalmen (BRS) submitted a comment relating to several issues. Among the issues addressed by BRS was the exclusivity provision. BRS expressed concern that individuals generally performing signal covered service, who are, therefore, generally signal employees, might be excluded from FMCSA's HS Regulations as a result of this provision, but also would not be subject to the FRA-administered statutory HS limitations if they did not perform covered service installing repairing or maintaining signal systems that commingled under Sec. 21104(b)(2)[39] with the time that they spent driving a commercial motor vehicle to an outlying work site. BRS's proposed solution to this apparent issue was for FRA to classify driving commercial motor vehicles for the purposes of installing, maintaining, or repairing signal systems to be signal-employee covered service.

In the Final Interpretations, FRA responded to BRS's stated concern, that there was an apparent gap in the HS limitations of FRA and FMCSA, by explaining that the exclusivity provision applies only where other FRA-

[38] FRA notes that Sec. 21104(e) would preclude the application of any of FMCSA's HS Regulations to any duty tour of a signal employee, including cumulative limitations. See also 49 CFR 395.1(r), excluding signal employees from the application of 49 CFR part 395.

[39] Sec. 21104(b)(2) reads, ''(b) Determining time on duty.—In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply: * * * (2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.''

administered HS limitations apply. The Final Interpretations stated, ''the statute does not allow an individual subject to the exemption granted at Sec. 21104(e) not to be subject to Sec. 21104(a).'' Final Interpretations, 77 FR at 12427. However, FRA noted that the interpretation would not completely preclude the application of FMCSA's HS Regulations to individuals who generally perform signal covered service, since there are circumstances where such an individual may drive a commercial motor vehicle to an outlying work site and then be provided with a statutory minimum off-duty period of at least 10 hours before beginning to perform covered service at the work site. Under these circumstances, FRA's position in the Final Interpretations was that if driving the commercial motor vehicle is not covered service, then the individual is not performing signal-employee functions, is not a signal employee during the time spent driving, and is not subject to Sec. 21104, including the exclusivity provision. FRA expressed a willingness to work with FMCSA to address the issue, but viewed those efforts as outside the scope of interpreting the statute.

In addressing the purported gap between the HS limitations, FRA's Final Interpretations simply applied the preexisting understanding of what activities are classified as ''engaged in installing, repairing, or maintaining signal systems'' under the old, pre-RSIA HS laws. However, labor organizations and railroad industry organizations have implicitly suggested that FRA's understanding of covered service should be revised in light of the statutory changes. Having considered the statute in light of these arguments, FRA agrees that the exclusivity provision at Sec. 21104(e) broadens the definition of signal-employee covered service that brings an individual within the scope of Sec. 21104.

Following the 1976 amendment of the HS laws [40] to cover ''an individual employed by the carrier who is engaged in installing, repairing or maintaining signal systems,'' FRA published an interim statement of agency policy and interpretation for signal service. 42 FR 4464 (Jan. 25, 1977) (1977 Signal Interim Interpretations). See Sec. 4(d) of Public Law 94–348 (July 8, 1976), adding new Sec. 3A to the Hours of Service Act, then codified at 45 U.S.C. 64; 42 FR 4464, January 25, 1977. In that contemporaneous interpretation, FRA noted that ''[p]erhaps the most difficult problem posed by the general language of [the statutory provisions governing such individuals] is the definition of time on duty. Individuals who work on signal systems often spend much of their compensated time traveling for the carrier's purposes.'' FRA ultimately determined that travel time devoted to the carrier's work was to be considered commingling service (other service for the carrier during a 24-hour period in which the employee is engaged in installing, maintaining, or repairing signal systems), such that the travel time would be considered time on duty if not separated by a statutory minimum off-duty period from direct work to install, repair, or maintain signal systems. Time spent returning from trouble calls or an outlying work site at the end of scheduled hours, was considered neither time on duty nor time off duty, an interpretation subsequently ratified by Congress in the 1978 amendments to the HS laws. Sec. 4 of Public Law 95–574 (November 2, 1978). Commuting time between an employee's residence and the employee's regular reporting point, which is determined by an employee in his or her decision of where to live, was considered time off duty.

Based in part on the nature of the statute as it existed in 1977, FRA stated that the functional approach of the HS laws meant that ''driving signal department vehicles is not covered service under the [HS laws].'' 1977 Signal Interim Interpretations, 42 FR at 4466. At the time that FRA published the 1977 Signal Interim Interpretations, the limitations of the HS laws applied only to individual duty tours, so there was little concern with individuals moving into and out of the classification ''signal employee'' based upon the functions performed at any given moment or within or outside of any individual duty tour.

As noted above, in Section III.B of this document, the RSIA amendments to the HS laws have attached more significance to the classification of an individual as a covered service employee beyond the boundaries of a particular duty tour. Although the functional approach is inherent to the HS laws as they currently exist, and a change from that approach to a status-based approach would require additional statutory amendments, FRA nonetheless recognizes that the functions that bring an individual employee within the scope of Sec. 21104 must be construed ''in connection with every other part or section of the statute to produce a harmonious whole.'' [41]

In the RSIA, Congress added to Sec. 21104 new subsection (e), which specifically references FMCSA's rules related to hours of service, duty hours, and rest periods as not applying to signal employees. Although the exclusivity provision can bear an interpretation of signal-employee covered service as it existed prior to the RSIA, such a narrow interpretation would allow individuals who often perform the functions of signal employees to be subject to the regulations of FMCSA, which seems to be contrary to the purpose of the exclusivity provision. Or, to the extent that FMCSA has excluded such individuals from the scope of its regulations, such employees could have no substantive Federal limitation on the time that could be spent in the driving function, provided that it is separated from the work of installing, repairing, or maintaining signal systems by at least a statutory minimum off-duty period of 10 hours, a result that is equally untenable. An alternative reading of the exclusivity provision recognizes that Congress expressly excluded signal employees from the application of FMCSA's regulations, and interprets what is necessary for an individual to be a signal employee in light of that exclusion.

As discussed above, FRA has long understood that driving a motor vehicle is often an integral part of performing work on signal systems. Much of signal system installation, maintenance, and repair will necessarily occur at track wayside locations, requiring significant amounts of travel to and from those locations for the individuals performing such work. Because of the immense scale of the rail network in the United States, this driving time may sometimes be sufficiently long that the driving is separated from the direct work on a signal system by a statutory minimum off-duty period of 10 consecutive hours. Under earlier FRA interpretations, FRA viewed the HS laws as not reaching the period of time spent driving for the purposes of a railroad if it was separated from the period of covered service by a statutory minimum off-duty period and, therefore, not within the duty tour.[42] When outside of a duty tour, time spent driving by individuals who generally

[40] In 1976 the statute was still called the Hours of Service Act. See note 2.

[41] *United States* v. *Uvalle-Patricio,* 478 F.3d 699 (5th Cir. 2007) (internal citations omitted). See also, *e.g., Bilski* v. *Kappos,* 130 S.Ct. 3218 (2010); Sutherland § 46:5.

[42] As discussed above, normal commuting time between an employee's residence and his or her normal headquarters or regular reporting point was and is considered time off duty. 42 FR 4466.

perform signal covered service was only regulated if it fell within the regulatory jurisdiction of FMCSA and FMCSA's HS Regulations. However, the RSIA rejected this status quo, and unequivocally stated that ''signal employees operating motor vehicles shall not be subject to any hours of service rules . . . promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.'' Maintaining FRA's prior narrow reading of what constitutes covered service would not fully exclude signal employees from the reach of FMCSA's HS Regulations, since such regulations include cumulative limits on total on-duty time and include all compensated time as time on duty, even when not connected with time spent driving.[43] Congress specifically identified ''signal employees operating motor vehicles'' as subject to the HS laws and under the authority of FRA, and understanding the operation of a motor vehicle for the purpose of installing, repairing, or maintaining signal systems to be service that is ''engaged in'' those activities brings such individuals entirely within the scope of Sec. 21104, consistent with the statutory mandate.

Such an interpretation is also consistent with FRA's prior understanding of the activities generally within the scope of a signal employee's employment. In construing the statutory definition of what an individual must do to be considered a ''signal employee,'' it is appropriate to consider the actual duties generally performed by such individuals, giving deference to the words that Congress chose to define as well as to the definition Congress provided.[44] Both Congress and FRA have recognized that signal employees ''spend much of their compensated time traveling for the carrier's purposes.'' [45] In discussing this issue previously, FRA noted that this fact created difficulties in interpreting what constituted time on duty for signal employees, and ultimately concluded that such time should be considered potentially commingling: Time on duty if commingled with other time on duty; and otherwise neither time on duty nor time off duty. FRA concludes that Congress intended Sec. 21104(e) to mean unequivocally that when these individuals are operating motor vehicles for the purpose of installing, repairing, or maintaining signal systems, these individuals shall be subject to the HS laws and not to FMCSA's HS Regulations; FRA's prior construction of the term ''signal employee'' and therefore the activities performed by an individual that make the individual subject to the HS laws, is not consistent with that congressional intent. Although FRA's prior reading of the statutory language was reasonable given the context of the HS laws as a whole, that context has now changed, and FRA's construction of the term ''signal employee'' must change with it.

Operating a motor vehicle from work site to work site is an integral part of the duty tour for many signal employees. Failing to recognize such operation as time on duty for signal employees, independent of whether the operation is immediately connected with the duty tour for which the vehicle is operated, would fail to account for Congress's clear statement that such activity should be governed by the HS laws. Accordingly, FRA understands an individual's operation of a motor vehicle for the purposes of that individual's installing, repairing, or maintaining signal systems to be service that is ''engaged in'' those activities and, therefore, signal-employee covered service. As a consequence, such driving time by the individual is time on duty for the purposes of Sec. 21104, regardless of whether the individual installs, repairs, or maintains a signal system during the same duty tour as the individual operated the motor vehicle.

However, as clarification, individuals who do not perform installation, repair, or maintenance of signal systems do not become signal employees simply by virtue of operating a motor vehicle transporting a signal employee. For instance, a driver contracted by a railroad solely to transport signal employees would not be performing covered service while driving, because the driver is not operating the motor vehicle for the purpose of himself or herself installing, repairing, or maintaining signal systems. Although operating a motor vehicle is a frequent component of signal employee duties, it is, of course, not exclusive to such employees. FRA also notes that an individual's operation of any motor vehicle for the purpose of himself or herself installing, repairing, or maintaining signal systems constitutes signal-employee covered service; the interpretation is not limited only to instances where the motor vehicle is a ''commercial motor vehicle'' within the meaning of FMCSA's HS Regulations. This distinction is relevant only to the extent that FMCSA's HS Regulations ever apply to individuals who ordinarily perform the functions of signal employees. As explained above, however, Congress specifically excluded signal employees from the application of HS rules promulgated by FMCSA, which would include FMCSA distinctions between motor vehicles.

FRA is aware that signal employees may sometimes drive themselves to outlying work sites and engage in activities that are not classified as signal-employee covered service prior to performing signal-employee covered service. Two examples follow that illustrate the application of FRA's new interim interpretation of ''signal employee.''

Example 10

Facts: An individual drives himself or herself to, and attends, a rules class at the outlying work site during one duty tour, and then performs signal-employee covered service at the same outlying work site during the next duty tour.

Effect of law: Despite the intervening rules class, the individual's drive to the outlying work site facilitated his or her subsequent performance of signal-employee covered service, and accordingly the driving time is time on duty subject to the FRA-administered HS laws rather than FMCSA's HS Regulations.

However, because the definition of ''signal employee'' is functional, there must be some connection, even if attenuated by intervening other activities or time off duty, between the time spent driving and the driver's performance of other signal employee functions in order for the time spent driving to be covered service and subject to the HS laws rather than FMCSA's HS Regulations. Only when the employee is driving a motor vehicle with no plausible connection to his or her future service installing, repairing, or maintaining signal systems is the driving time not time on duty as a signal employee. FRA recognizes the need for clarity in terms of what time spent in such driving is, and is not, considered time on duty; ambiguous travel time is time on duty, whereas travel time that is clearly and definitively not connected with proximate performance of signal employee functions is not signal-employee covered service.

Example 11

Facts: An individual drives from his or her headquarters at Location A to a rules class at Location B, attends the rules class, and then drives from Location B to Location C, where he or she repairs signal systems at Location C.

[43] 49 CFR 395.2, ''On-duty time.''

[44] See, e.g., *Johnson* v. *U.S.,* 130 S.Ct. 1265, 1271 (2010) (noting that Congress's choice of the words ''violent felony'' is relevant to interpreting the meaning of the definition of ''violent felony'' provided by Congress).

[45] FRA's 1977 Signal Interim Interpretations, 42 FR at 4464.

Effect of law: The time spent driving from the employee's headquarters to the rules class is not signal-employee covered service, unless it commingled with the eventual signal-employee covered service (i.e., the drive from Location B to Location C and the repair of the signal system at Location C), because the travel to the rules class location is not clearly connected to the performance of signal-employee covered service, since the employee is required to travel from the rules class location to another location in order for the employee to perform the covered service. In other words, assuming that neither the drive from Location B to Location C nor the signal-employee covered service at Location C was in the same duty tour as the rules class at Location A, the time that the employee spent driving to the rules class is not covered by the HS laws and is not covered by FMCSA's HS Regulations.

FRA acknowledges this gap in coverage for such drive times referenced in Example 12, but believes such instances are rare. FRA seeks comment on this aspect of its interim interpretation as well as on all other aspects of its interim interpretation.

C. Reiteration of FRA's Longstanding Interpretations of Travel Time Involving Signal Employees

As a result of this interim interpretation, the treatment of the time that signal employees spend operating motor vehicles is changing, but, as noted above, many of the other applications of the HS laws with respect to travel time for signal employees remain unchanged in the statutory text and in FRA interpretations. For the sake of clarity, FRA is briefly reiterating the agency's (and the statute's) prior and continuing treatment of these travel times as they apply to the new interpretation and providing any applicable supporting statutory references.

Travel on an on-track vehicle: Any time spent in transportation on an on-track vehicle, including any other type of travel time discussed below, is categorically time on duty as provided by Sec. 21104(b)(6).

Commuting time: FRA's longstanding interpretation, which remains unchanged, has been that normal commuting between the individual's residence and his or her regular reporting point or headquarters connected with the regular workday is not time on duty. Because employees choose where to reside with respect to their regular reporting point or headquarters, time spent commuting from the residence to that location is not service for a railroad. Note, however, that when an employee instead travels directly from his or her residence to a location other than his or her regular reporting point or headquarters, the travel time, minus the normal length of the individual's commuting time to the regular reporting point or headquarters, is service and, therefore, time on duty.

Travel time following the end of scheduled duty hours: As provided by Sec. 21104(b)(4) and (b)(5), travel time that begins either at the end of scheduled duty hours, or when the employee is released prior to the end of scheduled duty hours in order to comply with the HS laws, is neither time on duty nor time off duty, regardless of whether the employee returns to his or her headquarters or directly to his or her residence, and regardless of whether the employee operates a motor vehicle as part of such transportation. However, if the employee returns to duty less than 30 minutes after the completion of travel, the travel time is instead considered travel time during a duty tour governed by Sec. 21104(b)(7), as discussed below.

Travel time returning from a trouble call: As provided by Sec. 21104(b)(3), travel time returning from a trouble call is neither time on duty nor time off duty, regardless of whether the employee returns to his or her headquarters or directly to his or her residence, and regardless of whether the employee operates a motor vehicle as part of such transportation. However, if the employee returns to duty less than 30 minutes after the completion of travel, the travel time is instead considered travel time during a duty tour as provided by Sec. 21104(b)(7).

Other travel time: As discussed above, under FRA's new interim interpretation, any time spent by an individual operating a motor vehicle in order for the individual to engage in installing, repairing, or maintaining a signal system is time on duty, regardless of whether the period of time operating the motor vehicle is connected with the individual's duty tour. Any other travel time, such as time spent by an individual riding in a motor vehicle operated by someone else, during the individual's duty tour, is potentially commingling service, consistent with FRA's preexisting interpretation. This time spent by an individual riding in the motor vehicle commingles with time on duty that the individual accrued within the same duty tour and becomes time on duty. If there is no time on duty with which the travel time can commingle, such travel time instead becomes neither time on duty nor time off duty.

Joseph C. Szabo,

Administrator.

Appendix A

Appendix A: Brief Summary of Major Federal Hours of Service (HS) Requirements With Respect to Employees Who Perform One or More Types of Covered Service: Freight Train Employees, Passenger Train Employees, Signal Employees, and Dispatching Service Employees

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Citation	49 U.S.C. 21103	49 CFR part 228, subpart F	49 U.S.C. 21104	49 U.S.C. 21105.
Individuals Protected by the Federal HS Requirements because of the Type of Covered Service They Perform.	Train employees (individuals engaged in or connected with the movement of a train, including hostlers), except for train employees who are engaged in commuter or intercity rail passenger transportation, as defined in 49 CFR part 228, subpart F, who are instead subject to that regulation. See 49 U.S.C. 21102(c)(3).	Train employees who are engaged in commuter or intercity rail passenger transportation. (Includes a train employee who is engaged in commuter or intercity rail passenger transportation regardless of the nature of the entity by whom the employee is employed and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. Excludes a train employee of another type of railroad who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation, and a train employee of another type of railroad who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad.) See 49 CFR 228.403(c) and discussion under III.A of the Second Interim Interpretations.	Signal employees (individuals engaged in installing, repairing, or maintaining signal systems). See 49 U.S.C. 21101(4).	Dispatching service employees (operators, train dispatchers, or any other individual who by use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements). See 49 U.S.C. 21101(2).
Limitations on Time on Duty in a Single Tour.	A railroad may not require or allow an individual to remain or go on duty as a freight train employee in excess of 12 hours or if the individual has not had at least 10 consecutive hours off duty during the prior 24 hours.	A railroad may not require or allow an individual to remain or go on duty as a passenger train employee in excess of 12 hours or if the individual has not had at least 8 consecutive hours off duty during the prior 24 hours, or 10 consecutive hours off duty during the prior 24 hours if the individual has been on duty for 12 consecutive hours.	A railroad may not require or allow an individual to remain or go on duty as a signal employee in excess of 12 hours or if the individual has not had at least 10 consecutive hours off duty during the prior 24 hours.	A railroad may not require or allow an individual to remain or go on duty as a dispatching service employee for more than 9 hours in a 24-hour period at a place at which at least 2 shifts are employed or for more than 12 hours in a 24-hour period at a place where only one shift is employed.
End of Duty Tour	Duty tour ends at beginning of statutory minimum off-duty period.	Duty tour ends at beginning of statutory minimum off-duty period.	Duty tour ends at beginning of statutory minimum off-duty period.	Not applicable; any service for the railroad within 24 hours of time on duty will commingle with that time on duty.
Duration and Any Other Conditions of Minimum Off-Duty Period Between Two Duty Tours.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest. Additional time off duty is required when the total of time on duty and time waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time off duty exceeds 12 consecutive hours, which must also be uninterrupted.	8 consecutive hours; 10 consecutive hours if the employee has been on duty for 12 consecutive hours.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	No express minimum.
Duration and Any Other Conditions of Minimum Off-Duty Period Within a Duty Tour.	At least 4 hours of time off duty at the individual's designated terminal, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	At least 4 hours of time off duty at the individual's designated terminal.	At least 30 minutes of time off duty.	At least 1 hour of time off duty.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Limitations on Consecutive Duty Tours and Requirements for Extended Rest.	A railroad may not require or allow an individual to remain or go on duty as a freight train employee after initiating an on-duty period on six consecutive days without receiving 48 consecutive hours off duty and free from any service for any railroad at the individual's home terminal. (See definition of ''day'' and explanation of ''consecutive day'' below.) Individuals are permitted to initiate an on-duty period as a freight train employee on a seventh consecutive day when the individual ends the sixth consecutive day at the away-from-home terminal, as part of a pilot project, or as part of a collectively bargained agreement entered into prior to April 16, 2010 that expressly provides for such a schedule. An individual performing service on this additional day must receive 72 consecutive hours free from any service for any railroad at his or her home terminal before going on duty again as a freight train employee.	A railroad may not require or allow an individual to remain or go on duty as a passenger train employee if the individual has initiated an on-duty period each day on 13 or more consecutive calendar days in the series of at most 14 consecutive calendar days until the individual has had at least two consecutive calendar days on which he or she does not initiate an on-duty period. May not remain or go on duty as a passenger train employee if the individual has initiated an on-duty period each day on six or more consecutive calendar days including one or more Type 2 assignments until the individual has had at least 24 consecutive hours of time off duty. For definition of ''Type 2 assignment,'' see 49 CFR 228.5 or footnote 32 of the Second Interim Interpretations. During this time off duty, the individual must be at his or her home terminal and unavailable for any service for any railroad. If the employee is not at his or her home terminal when this time off duty is required, the employee may either deadhead to the point of final release at the employee's home terminal or initiate an on-duty period in order to return to the employee's home terminal either on the same calendar day or the next consecutive calendar day after the completion of the duty tour triggering the rest requirement.	None	None.
Monthly Cumulative Limitations	A railroad may not require or allow an individual to remain or go on duty, wait for or be in deadhead transportation to the point of final release, or be in any other mandatory service for the carrier in any calendar month where the employee has spent a total of 276 hours on duty, waiting for or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier. A railroad may not require or allow an individual to exceed a total of 30 hours per calendar month spent waiting for or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, except in the circumstances stated.	None	None	None.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Definition of ''Time Neither On Duty nor Off Duty''.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent returning from a trouble call, whether the individual goes directly to the employee's residence or by way of the employee's headquarters. Time after scheduled duty hours necessarily spent in completing the trip directly to the individual's residence or to the individual's headquarters, if the individual has not completed the trip from the final outlying worksite of the duty period at the end of scheduled duty hours, or if the individual is released from duty at an outlying worksite before the end of the individual's scheduled duty hours to comply with 49 U.S.C. 21104. However, time spent in transportation on an on-track vehicle is time on duty.	None.
Emergencies in General	A freight train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency.	A passenger train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency.	A signal employee may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. Routine repairs, routine maintenance, or routine inspection of signal systems is not an emergency that allows for additional time on duty.	A dispatching service employee may be allowed to remain or go on duty for no more than 4 additional hours during a period of 24 consecutive hours for no more than 3 days during a period of 7 consecutive days.
Explanation of the End of an Emergency.	The emergency ends when the track is cleared and the railroad line is open for traffic.	The emergency ends when the track is cleared and the railroad line is open for traffic.	The emergency ends when the signal system is restored to service.	None.
Definition of ''Day'' and ''Consecutive Day''.	24 consecutive hours; two initiations of an on-duty period are on consecutive days where they are separated by less than 24 hours of time off duty, measured from the time of the employee's final release from duty until the time that the employee next reports for duty.	Calendar days; two calendar days are consecutive if adjacent to one another.	Not Applicable	Not Applicable Except in Context of Emergency Provision.
Explicit Use of Fatigue Science	None	Passenger train employees' work schedules must be analyzed under an FRA-approved validated biomathematical fatigue model, with the exception of certain schedules deemed as categorically presenting an acceptable level of risk for fatigue that does not violate the defined fatigue threshold.	None	None.
Specific Rules for Nighttime Operations.	None	Schedules that include any time on duty between 8 p.m. and 4 a.m. must be analyzed using a validated biomathematical model of human performance and fatigue approved by FRA. Schedules with excess risk of fatigue must be mitigated or supported by a determination that mitigation is not possible and the schedule is operationally necessary and approved by FRA.	None	None.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Specific Rules for Unscheduled Assignments.	None	The potential for fatigue presented by unscheduled work assignments must be mitigated as part of a railroad's FRA-approved fatigue mitigation plan. Plans must be submitted for FRA review and approval, along with the associated schedules requiring mitigation.	None	None.

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