

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Chapter II**

[Docket No. 2009–0057, Notice No. 2]

**Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Response to Public Comment**

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

**ACTION:** Statement of agency policy and interpretation; response to public comment.

**SUMMARY:** In this document FRA states the agency's position on certain interpretive questions arising out of some of the complex and important amendments enacted in 2008 to the Federal railroad safety laws that govern such matters as how long a railroad may require or allow an employee in a certain category to remain on duty and how long the railroad must give the employee off duty before the employee may go on duty again. In issuing this interpretation, FRA has considered public comments that it received on its June 2009 document that contained the agency's interim interpretations of those amended laws.

**DATES:** This document is effective on May 29, 2012.

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**B. Questions Related to the Requirements Applicable to Train Employees for 48 or 72 Hours Off at the Home Terminal**

1. Is a "Day" a calendar day or a 24-hour period for the purposes of this provision?
2. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?
3. Does deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day count as a day that triggers the 48-hour or 72-hour rest period requirement?
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**C. Questions Related to the 276-Hour Monthly Maximum for Train Employees of Time on Duty, Waiting for or Being in Deadhead Transportation to Final**

Release, and in Other Mandatory Service for the Carrier

1. If an employee reaches or exceeds 276 hours for the calendar month during a trip that ends at the employee's away-from-home terminal, may the railroad deadhead the employee home during that month?
  2. How will FRA apply the 276-hour cap to employees who only occasionally perform covered service as a train employee, but whose hours, when combined with their regular shifts in non-covered service, would exceed 276 hours?
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**I. Executive Summary**

Having considered public comments in response to FRA's June 26, 2009

interim statement of agency policy and interpretation (Interim Interpretations) and its proposed interpretation, 74 FR 30665, FRA issues this final statement of agency policy and interpretation.

Federal laws governing railroad employees' hours of service date back to 1907 with the enactment of the Hours of Service Act (Pub. L. 59-274, 34 Stat. 1415), and FRA, under delegations from the Secretary of Transportation (Secretary), has long administered statutory hours of service requirements for the three groups of employees now covered under the statute, namely employees performing the functions of train employees, signal employees, and dispatching service employees, as those terms are defined at 49 U.S.C. 21101. See 49 CFR 1.49; 49 U.S.C. 21101-21109, 21303. These requirements have been amended several times over the years, most recently in the Rail Safety Improvement Act of 2008 (Pub. L. 110-432, Div. A) (RSIA). The RSIA substantially amended the requirements of 49 U.S.C. 21103, applicable to train employees, defined as "individual[s] engaged in or connected with the movement of a train, including a hostler," 49 U.S.C. 21101(5), and the requirements of 49 U.S.C. 21104, applicable to signal employees, defined as "individual[s] who [are] engaged in installing, repairing, or maintaining signal systems." 49 U.S.C. 21101(4). FRA previously discussed these amendments in its Interim Interpretations, and now clarifies those interpretations and answers questions raised by commenters. The current hours of service laws are summarized very briefly below, divided by type of covered service.

Citation	Train employees 49 U.S.C. 21103	Signal employees 49 U.S.C. 21104	Dispatching service employees 49 U.S.C. 21105
Covered Individuals	Individuals engaged in or connected with the movement of a train, including hostlers. Train employees who are engaged in commuter or intercity rail passenger transportation, as defined in 49 CFR part 228, subpart F, are instead subject to that regulation. See 49 U.S.C. 21102(c)(3).	Individuals engaged in installing, repairing, or maintaining signal systems.	Operators, train dispatchers, or any other employee who by use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.
Limitations on Time on Duty in a Single Tour.	May not remain or go on duty in excess of 12 hours or if the employee has not had at least 10 consecutive hours off duty during the prior 24 hours.	May not remain or go on duty in excess of 12 hours or if the employee has not had at least 10 consecutive hours off duty during the prior 24 hours.	May not remain or go on duty for more than 9 or 12 hours in a 24-hour period, depending on the number of shifts employed at the tower, office, station, or place the employee is on duty.

Citation	Train employees 49 U.S.C. 21103	Signal employees 49 U.S.C. 21104	Dispatching service employees 49 U.S.C. 21105
Minimum Off-Duty Period Between 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.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	Not applicable.
Minimum Off-Duty Period Within a Duty Tour.	At least 4 hours of time off duty at a designated terminal, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	At least 30 minutes of time off duty .....	Not applicable.
Limitations on Consecutive Duty Tours.	May not remain or go on duty 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 carrier at the employee's home terminal. Employees are permitted to initiate a seventh consecutive day when the employee 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. Employees performing service on this additional day must receive 72 consecutive hours free from any service for any railroad carrier at their home terminal before going on duty again as a train employee.	None .....	None.
Monthly Cumulative Limitations.	May not 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. May not 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.
Time Neither On Duty nor Off Duty As Defined by the Statute.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters.	None.

Citation	Train employees 49 U.S.C. 21103	Signal employees 49 U.S.C. 21104	Dispatching service employees 49 U.S.C. 21105
Emergencies in General.	A 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.	Time after scheduled duty hours necessarily spent in completing the trip directly to the employee's residence or to the employee's headquarters, if the employee has not completed the trip from the final outlying worksite of the duty period at the end of scheduled duty hours, or if the employee is released from duty at an outlying worksite before the end of the employee'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. 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.
End of Emergency	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.	Not Applicable.

In the proposed interpretation that appeared in the same document as the Interim Interpretations, FRA proposed a new interpretation of the new hours of service laws with respect to the 24-hour period within which a train employee or signal employee must have had the minimum 10-hour statutory off-duty period before the employee is allowed to go on duty or remain on duty. This proposed interpretation would have required that the train employee or signal employee have had the statutory minimum off-duty period in the 24 hours preceding any moment during which that employee is on duty, making the maximum work window 14 hours after the end of the statutory minimum off-duty period. In this final statement of agency policy, FRA rejects the proposed interpretation and maintains the longstanding "fresh start" interpretation, which requires only that the statutory minimum off-duty period be within the 24 hours before a train employee or signal employee initiates an on-duty period. As a result, there will be no change to the current interpretation that the statutory minimum off-duty period must only be within the 24 hours prior to the time when an employee initiates an on-duty period.

The other issues addressed by FRA largely fall into three categories: questions relating to the "consecutive-

days" limitation, the prohibition on communication with train employees and signal employees during their statutory minimum off-duty periods, and the monthly limitation for train employees of 276 hours in time on duty, waiting for or in deadhead transportation, or performing any other mandatory service for the railroad carrier. Each issue is discussed in significantly more detail in the subsequent sections of this document; this summary provides only a brief overview of FRA's policy and interpretation.

In the Interim Interpretations, FRA defined the "day" in the consecutive-days limitation to be a calendar day, on the basis that such an interpretation would be administratively simpler. Experience with the application of this definition and public comments on the definition show that the "calendar day" interpretation was more complicated and provided less protection against fatigue than originally anticipated; as a result, FRA has revised its interpretation of "day" in the context of the "consecutive-days" limitation to refer to the 24-hour period following an employee's final release from duty. Under this interpretation, if an employee does not initiate an on-duty period within 24 hours of the employee's final release from the previous duty tour, this will count as a

"day" in which the employee did not initiate an on-duty period, and the string of consecutive days will be broken.

Another source of confusion in the Interim Interpretations was FRA's definition of "work" in the "consecutive-days" limitation's allowance that an employee may "work" on a seventh consecutive day in certain circumstances. FRA has revised this interpretation to reduce confusion by clearly stating that "work" for the "consecutive-days" limitation is equivalent to "initiate an on-duty period." This earlier definition of "work" also led some commenters to be confused about how stand-alone deadhead transportation would be treated with respect to the initiation of an on-duty period; FRA has clarified that a stand-alone deadhead is not time on duty, and is therefore not the initiation of an on-duty period. Therefore, a day in which an employee is in deadhead transportation but does not engage in any covered service with which the deadhead can commingle will not be counted as part of the series of consecutive days, and will break that series.

Similarly, if an employee is called to report for duty, but does not actually report for duty, such an employee has not initiated an on-duty period for the purposes of the consecutive-days

limitation. However, employees that do report for duty have initiated an on-duty period, even if they are released from duty shortly thereafter, before performing any covered service. FRA also clarifies that, while other service for the railroad may not be time on duty if it does not commingle with covered service, this fact does not prevent commingling if the other service is not separated from the covered service by a statutory minimum off-duty period. In response to a question relating to the interaction between the "6-day" limitation and the "7-day" limitation, FRA notes that an employee who is eligible to initiate an on-duty period for 7 consecutive days but only initiates an on-duty period on 6 consecutive days must have 48 hours of time off duty and free from any service for any railroad. FRA also provides clarification on the impact of the consecutive-days limitations on employees who choose to work for multiple railroads. Finally, in response to a question in the comments, FRA provides additional discussion of when an employee may be subject to individual liability enforcement action for deliberately misrepresenting his or her availability.

On the issue of the prohibition on communication by the railroad with train employees and signal employees, comments received in response to the Interim Interpretations indicated significant confusion over the period of time during which the prohibition applies. FRA explains that, because the prohibition applies only to certain off-duty periods such as the statutory minimum off-duty period, railroads are free to communicate with train employees and signal employees so long as there is sufficient undisturbed time off duty to complete the appropriate type of off-duty period. Similarly, because the prohibition only applies to certain off-duty periods, a violation of the prohibition does not occur unless a disruptive communication prevents an employee from having sufficient rest to avoid excess service. For example, if a railroad interrupted an employee's rest, but restarted the rest period and provided a full statutory off-duty period after the interruption before the employee was next called to report for duty, there would be no violation, because the employee had 10 hours uninterrupted rest between duty tours. Comments also indicated the tension between the Interim Interpretations addressing an employee's ability to contact the railroad and establishing a time to report during a statutory minimum off-duty period. FRA has resolved this issue by clearly stating that

employees may call a railroad or contractor for any purpose during rest periods required to be free from disruptive communication, including establishing a time to report, while preserving the longstanding interpretation that some types of conversations are service for the railroad that would not be time off duty.

On a related topic, comments requested that employees be able to give advance permission to railroads to communicate during the prohibited time, such that employees would only need to allow communications once for all of their applicable off-duty periods. However, railroads and contractors are only permitted to contact employees during the prohibited times if the employee contacts the railroad or contractor during the prohibited time and specifically permits a return contact. Employees are not permitted to grant advance permission for all off-duty periods; a communication from an employee to a railroad or contractor applies only to the off-duty period in which the communication was made. Because the prohibition applies to "communication," and not phone calls specifically, the prohibition applies to all forms of communication. However, because employees are permitted to initiate a communication, means of providing information that can be accessed at the employee's option, such as a railroad Web site or messages sent to a railroad-provided phone, do not violate the prohibition so long as employees have the option of whether or not to check for such messages.

FRA also received several questions concerning the 276-hour monthly limit on service for the railroad by train employees. Most of these questions discussed FRA's note that activities that an employee has the freedom to schedule, such as an appointment the employee makes for a vision exam, will not count towards the 276-hour limitation. This does not mean that time spent in such activities, which can also include activities like optional rules refresher classes or the acquisition of security access cards for hazardous materials facilities, no longer commingle with time on duty. FRA clarifies that if these activities are not separated from time on duty by a statutory minimum off-duty period, the time spent in these activities will commingle, become time on duty, and count toward the monthly limitation. FRA also explains that the 276-hour monthly limitation applies only to single railroads, such that an employee who chooses to work for multiple railroads will be subject to separate 276-hour limitations for each railroad.

Finally, FRA reiterates that merely reporting for duty is not an act of deliberately misrepresenting availability that would make an employee subject to individual liability for violations of the hours of service laws.

In addition to these topics, FRA also addresses several miscellaneous issues raised by commenters. This includes a discussion of the function-based interpretation of which employees are covered by the hours of service laws. As has long been the case, only employees who perform the functions described in the "definitions" section of the hours of service laws, 49 U.S.C. 21101, are covered under the hours of service laws. This may or may not include employees who are described as "yardmasters" or "mechanical employees." FRA also maintains the longstanding interpretation that time spent commuting is time off duty, and accordingly an employee may commute during the uninterrupted rest period. One commenter asked if the statutory exceptions to the time counted towards the monthly limitation on limbo time apply to the requirement that an employee receive additional time off after exceeding 12 hours of time on duty and time waiting for or in deadhead transportation; because these exceptions explicitly state that they only apply to the monthly limit, the exceptions do not also apply to the additional rest requirement. Thus, an employee will still be required to receive additional rest, even if one of the exceptions to the monthly limitation occurred during the employee's duty tour and that situation may have contributed to extending the duty tour which resulted in the need for additional rest.

With respect to signal employees, FRA explains the application of the exclusivity provision; because it applies only to signal employees, and signal employees are covered by the "signal employee" provision of the hours of service laws (including the exclusivity provision), only an employee who is subject to FRA's hours of service laws is not subject to the Federal Motor Carrier Safety Administration's (FMCSA) hours of service regulations during the same duty tour as a result of the exclusivity provision. An individual who does not work as a signal employee during a particular duty tour may instead be subject to the FMCSA hours of service regulations during that tour if he or she performs functions covered by those regulations, such as driving a commercial motor vehicle.

Finally, the Interim Interpretations are reprinted for ease of reference. Where the interpretation has changed, the text has been replaced with a reference to

where in this document the new answer can be found.

## II. Background

On October 16, 2008, the Rail Safety Improvement Act of 2008 (RSIA) was enacted. See Public Law 110-432, Div. A, 122 Stat. 4848. Section (Sec.) 108 of the RSIA made important changes to 49 U.S.C. ch. 211, Hours of service, as amended through October 15, 2008 (the old hours of service laws). See 122 Stat. 4860-4866. Some of these changes became effective immediately on the date of enactment, and others became effective nine months later, on July 16, 2009. In particular, under Sec. 108(g) of the RSIA, subsections (d), (e), (f), and (g) of the section became effective on the date of enactment of the RSIA, and subsections (a), (b), and (c) of the section became effective nine months later, on July 16, 2009. Because of the significance of the amendments to the old hours of service laws made by Sec. 108, on June 26, 2009, FRA published an interim statement of agency policy and interpretation (Interim Interpretations) to address questions of statutory interpretation that had arisen so far with respect to the hours of service laws as amended by the RSIA (the new hours of service laws). 74 FR 30665 (June 26, 2009). In the same document, FRA also proposed a new interpretation of the new hours of service laws with respect to the 24-hour period within which a train employee or signal employee must have had the minimum statutory off-duty period before the employee is allowed to go on duty or remain on duty (Proposed Interpretation).

As with the Interim Interpretations, FRA is not addressing the amendments to the old hours of service laws made by Sec. 420 of the RSIA, which changed 49 U.S.C. 21106, Limitations on employee sleeping quarters, effective October 16, 2008. See 76 FR 67073 (Oct. 31, 2011). Nor is FRA presently revising either appendix A of 49 CFR part 228, which contains FRA's previously published interpretations of the old hours of service laws, known until the 1994 recodification as the Hours of Service Act (see Pub. L. 103-272), nor FRA's previously published interpretations concerning the limitations on hours of service of individuals engaged in installing, repairing or maintaining signal systems, an interim statement of agency policy and interpretation at 42 FR 4464 (Jan. 25, 1977). FRA plans to make conforming changes and other changes to 49 CFR part 228, appendix A, and to previously existing technical bulletins, in the future.

## III. Changes in the Old Hours of Service Laws Made by Sec. 108 of the RSIA

### A. Extending Hours of Service Protections to Employees of Contractors and Subcontractors to Railroads Who Perform Certain Signal-Related Functions

Sec. 108(a) of the RSIA (Sec. 108(a)) amended the definition of "signal employee", to eliminate the words "employed by a railroad carrier". 49 U.S.C. 21101(4). With this amendment, employees of contractors or subcontractors to a railroad who are engaged in installing, repairing, or maintaining signal systems (the functions within the definition of signal employee in the old hours of service laws) are covered by the new hours of service laws, because a signal employee under the new hours of service laws is no longer by definition only a railroad employee.

It should be noted that an employee of a contractor or subcontractor to a railroad who is "engaged in or connected with the movement of a train" was considered a "train employee" under the old hours of service laws and continues to be considered a train employee under the new hours of service laws. 49 U.S.C. 21101(5). Likewise, an employee of a contractor or subcontractor to a railroad who "by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements" was considered a "dispatching service employee" under the old hours of service laws and continues to be considered a "dispatching service employee" under the new hours of service laws. 49 U.S.C. 21101(2).

### B. Changing Hours of Service Requirements Related to Train Employees

Sec. 108(b) amended the old hours of service requirements for train employees in many ways, all of which amendments became effective July 16, 2009, except with respect to train employees providing commuter or intercity passenger rail service, whom Sec. 108(d) made subject initially to the old hours of service laws and then to regulations promulgated by FRA if issued timely, and, if not, to the new hours of service laws. 49 U.S.C. 21103 and 21102.<sup>1</sup> Sec. 108(b) limited train employees to 276 hours of time on-duty, awaiting or in deadhead transportation

from a duty assignment to the place of final release, or in any other mandatory service for the carrier per calendar month. 49 U.S.C. 21103(a)(1). The provision retained the existing maximum of 12 consecutive hours on duty, but increased the minimum off-duty period to 10 consecutive hours during the prior 24-hour period. 49 U.S.C. 21103(a)(2), (3).

Sec. 108(b) also required that after an employee initiates an on-duty period each day for six consecutive days, the employee must receive at least 48 consecutive hours off duty at the employee's home terminal, during which the employee is unavailable for any service for any railroad; except that if the sixth on-duty period ends at a location other than the home terminal, the employee may initiate an on-duty period for a seventh consecutive day in order to reach the employee's home terminal, 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. 49 U.S.C. 21103(a)(4).

Sec. 108(b) further provided that employees may also initiate an on-duty period for a seventh consecutive day and must then receive 72 consecutive hours off duty 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 by a collective bargaining agreement entered into during that period, or a pilot program that is either authorized by collective bargaining agreement, or related to work rest cycles under the hours of service laws at 49 U.S.C. 21108 (Sec. 21108). 49 U.S.C. 21103(a)(4).

Sec. 108(b) also provided that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty if the procedures of 49 U.S.C. 20103 are followed (i.e., essentially, if public notice and an opportunity for an oral presentation are provided prior to issuing the waiver), if a collective bargaining agreement provides a different arrangement that the Secretary determines is in the public interest and consistent with safety. *Id.*

Sec. 108(b) also significantly changed the old hours of service requirements for train employees by establishing for the first time a limitation on the amount of time an employee may spend awaiting and in deadhead transportation. 49 U.S.C. 21103(c)(1). In particular, it provided that a railroad may not require or allow an employee to exceed 40 hours per month awaiting and in

<sup>1</sup>FRA has promulgated regulations effective October 15, 2011 establishing hours of service requirements for train employees providing commuter or intercity passenger rail service. 76 FR 50360 (August 12, 2011).

deadhead transportation from duty that is neither time on duty nor time off duty from the July 16, 2009 effective date of the provision through October 15, 2009,<sup>2</sup> with that number decreasing to 30 hours per employee per month beginning October 16, 2009, except in certain situations. These monthly limits do not apply if the train carrying the employee is directly delayed by casualty, accident, act of God, derailment, major equipment failure that keeps the train from moving forward, or other delay from unforeseeable cause. 49 U.S.C. 21103(c)(2). Railroads are required to report to the Secretary all instances in which these limitations are exceeded. 49 U.S.C. 21103(c)(3). See also 49 CFR 228.19. In addition, the railroad is required to provide the train employee with additional time off duty equal to the amount that the combination of the total time on duty and time spent awaiting or in transportation to final release exceeds 12 hours for a particular duty tour. 49 U.S.C. 21103(c)(4).

Finally, Sec. 108(b) restricted railroads' communication with their train employees, except in case of emergency, during the minimum statutory 10-hour off-duty period, statutory periods of interim release, and periods of additional rest required equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours. 49 U.S.C. 21103(e). Further, the Secretary may waive this provision for train employees of commuter or intercity passenger railroads if the Secretary determines that a waiver would not reduce safety and is necessary to efficiency and on time performance. *Id.* However, because train employees of commuter and intercity passenger railroads are no longer subject to the statutory hours of service limitations, such waivers are no longer applicable to these employees.

As was alluded to earlier, Sec. 108(d) provided that the requirements described above for train employees did not go into effect on July 16, 2009, for train employees of commuter and intercity passenger railroads. 49 U.S.C. 21102(c). Sec. 108(d) provided the Secretary with the authority to issue hours of service rules and orders applicable to these train employees, which may be different than the statute applied to other train employees. 49 U.S.C. 21109(b). Sec. 108(d) further provided that these train employees

who provide commuter or intercity passenger rail service would continue to be governed by the old hours of service laws (as they existed immediately prior to the enactment of the RSIA) until the effective date of regulations promulgated by the Secretary. 49 U.S.C. 21102(c). If no new regulations had been promulgated before October 16, 2011, the provisions of Sec. 108(b) would have been extended to these employees at that time. *Id.* Such regulations have since been timely promulgated, 76 FR 50360 (August 12, 2011), to be codified at 49 CFR part 228, subpart F, with an effective date of October 15, 2011. Accordingly, the hours of service of train employees who provide commuter and intercity passenger rail service are not governed by the statutory hours of service laws at 49 U.S.C. 21103, but by those regulations.

#### *C. Changing Hours of Service Requirements Related to Signal Employees*

Sec. 108(c) amended the hours of service requirements for signal employees in a number of ways. 49 U.S.C. 21104. As was noted above, by amending the definition of "signal employee," Sec. 108(a) extended the reach of the substantive requirements of Sec. 108(c) to a contractor or subcontractor to a railroad carrier and its officers and agents. 49 U.S.C. 21101(4). In addition, as Sec. 108(b) did for train employees, Sec. 108(c) retained for signal employees the existing maximum of 12 consecutive hours on duty, but increased the minimum off-duty period to 10 consecutive hours during the prior 24-hour period. 49 U.S.C. 21104(a)(1), (2). Further, Sec. 108(c) deleted the prohibition in the old hours of service laws at 49 U.S.C. 21104(a)(2)(C) against requiring or allowing a signal employee to remain or go on duty "after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty."

Sec. 108(c) also eliminated language in the old hours of service laws stating that the last hour of signal employee's return from final trouble call was time off duty, and defined "emergency situations" in which the new hours of service laws permit signal employees to work additional hours to exclude routine repairs, maintenance, or inspection. 49 U.S.C. 21104(b), (c).

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

emergency situation. 49 U.S.C. 21104(d).

Finally, Sec. 108(c) provided that the hours of service, duty hours, and rest periods of signal employees are governed exclusively by the new hours of service laws, and that signal employees operating motor vehicles are not subject to other hours of service, duty hours, or rest period rules besides FRA's. 49 U.S.C. 21104(e).

The requirements of the old hours of service laws for dispatching service employees (49 U.S.C. 21105) were not modified by the RSIA.

#### **IV. Response to Public Comments on FRA's Proposed Interpretation and Interim Interpretations**

FRA received 62 sets of comments addressing either the proposed interpretation or the Interim Interpretations, or both, from the representatives of a total of nine organizations and from 45 individuals, with some individuals and organizations filing multiple sets of comments. The groups that submitted comments were as follows: the American Public Transportation Association (APTA); the Association of American Railroads (AAR); the Brotherhood of Railroad Signalmen (BRS); the Brotherhood of Locomotive Engineers and Trainmen (BLET); the United Transportation Union (UTU); the Nevada and Georgia State Legislative Boards of the BLET; and the Tennessee and Nebraska State boards of the UTU.

##### *A. FRA's Decision To Retain its Longstanding "Fresh Start" Interpretation and Not To Adopt the Proposed "Continuous Lookback" Interpretation*

In the **Federal Register** document that included the Interim Interpretations, FRA proposed a new interpretation of what constitutes "during the prior 24 hours" for the purposes of the prohibition against requiring or permitting a train employee or a signal employee to remain on duty without having had a certain minimum number of consecutive hours off duty during the prior 24 hours. This prohibition is currently found in 49 U.S.C. 21103(a)(3) and 21104(a)(2) (Sec. 21103(a)(3) and 21104(a)(2)).

Under FRA's current "fresh start" interpretation of this prohibition, "the prior 24 hours" end when an employee reports for a new duty tour. At the instant that the employee reports for duty, FRA looks back at the single 24-hour period before the employee reported for duty to see that the employee had at least 10 consecutive hours off following the prior duty

<sup>2</sup> The language of Sec. 108(b) must be read in conjunction with the language of Sec. 108(g), which provides that Sec. 108(b) becomes effective on July 16, 2009.

assignment. If so, then the employee may be required or permitted to work a maximum of 12 consecutive hours or a total of 12 hours, in broken service, in the next 24 hours, and must get 10 hours off either after working that 12 hours or at the end of the 24-hour period that began when the employee went on duty, whichever occurs first, before the employee is allowed to go on duty again. If an employee had a duty tour involving broken service, including an interim release of at least 4 hours, but less than the 10 hours required for a statutory minimum off-duty period, between two periods of service within the same duty tour, some or all of the employee's eventual statutory minimum off-duty period would come after the 24-hour period that began when the employee reported for duty. The following example illustrates the application of FRA's current, "fresh start" interpretation of "the prior 24 hours":

- An employee reports for duty at 10 a.m. on a Monday. If the employee had had 10 consecutive hours off duty at any time between 10 a.m. on the preceding day (Sunday) to 10 a.m. on that Monday, FRA would consider the employee as having had the minimum off-duty period during "prior 24 hours" because the "prior 24 hours" is defined as the 24 hours prior to the employee's act of reporting for duty. The employee would then be permitted to remain on duty for up to 12 hours in the following 24 hours, such that the employee must no longer accrue time on duty after 10 a.m. on Tuesday.

Conversely, under the Proposed Interpretation (which takes the "continuous lookback" approach to identifying the statutory minimum off-duty period during "the prior 24 hours"), the statutory minimum off-duty period would have to be within each of the floating 24-hour periods not only starting when an employee begins a new duty tour, but also during the employee's duty tour, and ending when the employee is relieved from duty, meaning that upon reporting for duty, the employee would have a maximum of 14 hours within which to work a maximum of 12 hours, before the employee would be required to be finally released to have a statutory minimum off-duty period.

The following two examples illustrate the application of the proposed "continuous lookback" interpretation.

1. If an employee is off duty from 1 a.m. Monday until 11 a.m. on Monday and then reports for duty at 11 a.m. and works until 11 p.m. on Monday, the 10-hour statutory minimum off-duty period is within the prior 24 hours from any moment while the employee is on duty, up to the time of the

employee's final release at 11 p.m. on Monday.

2. However, if the same employee, who was off duty from 1 a.m. Monday until 11 a.m. on Monday and went on duty at 11 a.m. on Monday, then worked for 6 hours and had an interim release from 5 p.m. until 11 p.m. on Monday before returning to duty from 11 p.m. and worked for six more hours until being finally released at 5 a.m. on Tuesday, the employee's time on duty after 1 a.m. on Tuesday would violate the statute because the required full statutory off-duty period would not be within the 24 hours prior to any moment after 1 a.m. on Tuesday). In other words, in this scenario, the employee must no longer accrue time on duty after 1 a.m. on Tuesday.

In discussing the Proposed Interpretation, FRA stated that the "fresh start" interpretation of the law (the interpretation issued more than 30 years prior to the enactment of RSIA, at 42 FR 4464, Jan. 25, 1977, which has remained FRA's interpretation since that time) may no longer be consistent with the plain language of the statute. By the terms of the statute as amended by the RSIA, a railroad may not require or allow a train employee to "remain or go on duty unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours." As explained above, under the "fresh start" interpretation, a new 24-hour period begins when an employee reports for duty after having had at least the minimum required off-duty period of 10 consecutive hours, and the 24-hour period within which the employee is required to have had the required off-duty period is a single, static prior period, looking only at the 24-hour period prior to when the employee goes on duty for the first time in the new duty tour. Accordingly, when determining if an employee may continue on duty ("remain on duty") after any point in time later in the duty tour, FRA would not look to find the required 10-hour rest period within the 24 hours prior to that later point in time; instead, FRA would look for the required rest period only during the single 24-hour period immediately prior to the initiation of the duty tour. The RSIA added 49 U.S.C. 21103(e) and 21104(d), which prohibit communication with train employees and signal employees respectively during the 10 hour statutory minimum off-duty period. (FRA's interpretations of these provisions are discussed in Sections IV.C and V.A of this document.) Under the "fresh start" approach, since the statutory minimum off-duty period must simply be found in the 24 hours prior to the employee reporting for duty, an employee whose off-duty period was longer than 10

hours could be subject to unlimited communication once the employee had received the required 10 hours uninterrupted, which would reduce or eliminate the benefits of the requirement of an uninterrupted rest period.

By contrast, under the Proposed Interpretation, FRA would instead look for a statutory rest period that is within each 24-hour period prior to any moment during the employee's duty tour. This Proposed Interpretation is referred to as "continuous lookback" or the "continuous lookback" approach." This approach would require the uninterrupted 10 hours to be closer to the time that the employee reports for a new duty tour, so that it could still be found within the 24-hour period at any point in the new duty tour.

Reaction to this Proposed Interpretation largely favors rejecting it, with BRS, BLET, UTU, AAR, and APTA lined up on one side opposing the proposal and several individuals and two State boards of rail labor unions on the other side supporting the proposal. Of the commenters that favor the proposed "continuous lookback approach," a substantial number express concern over a railroad practice of repeatedly calling an employee as soon as he or she has met the threshold for minimum hours off duty, even though that employee has a scheduled assignment well afterwards. In so doing, commenters contend the practice prevents an employee from being able to rest immediately prior to his or her assignment and thereby increases that employee's fatigue while performing his or her duties. These commenters uniformly hope that the "continuous lookback" approach would increase the train employees' and signal employees' opportunity for rest by giving them at least 10 hours of notice prior to beginning an on-duty period and, therefore, enabling them to schedule their rest accordingly, though FRA believes this is unlikely to be the case for the reasons discussed below.

Comments that oppose the "continuous lookback" interpretation are summarized in turn, by commenter. BRS expresses several concerns. First, BRS argues that the "continuous lookback" is overly complex, in that a signal employee may no longer simply look for a rest period ending within the 24 hours prior to starting a new duty tour. Second, BRS argues that because the "continuous lookback" approach would limit signal employees to working within a period of 14 hours after the completion of their required off-duty period, within which to accumulate up to the maximum of 12

hours on duty, the interpretation would substantially limit the ability of signal employees to work after their scheduled hours, including response to trouble calls or on rest days. Finally, BRS asserts that the interpretation prevents the “emergency” provision of the statute (49 U.S.C. 21104(c) (Sec. 21104(c)), i.e., permission to work up to 4 additional hours within the 24-hour period, which was unchanged by the RSIA, from being effective.

Another commenter, AAR, argues that the option of taking the “continuous lookback” approach has been foreclosed through Congressional inaction in the face of FRA’s longstanding interpretation. Next, AAR echoes the BRS’s argument regarding the emergency provision in 49 U.S.C. 21104(c). Further, AAR claims that, because the “continuous lookback” approach would limit the number of hours available to an employee in which to accumulate time on duty before the statutory off-duty period is required, the approach would prohibit employees from working as many hours as they are permitted under the current “fresh start” interpretation, which would harm both management and employees in a number of ways. For example, AAR expresses concern that call times<sup>3</sup> of greater than 2 hours and less than 10 hours, would prevent an employee from working a full 12 hours, and that increasing call times to 10 hours to avoid this problem would lead to unacceptable train delays. AAR also points out that the decreased period available for employees to accrue time on duty would limit the railroads’ ability to make use of periods of interim release within a duty tour, which could mean that employees would more often instead have to spend a statutory off-duty period at an away-from-home terminal. Likewise, if the “continuous lookback” interpretation were extended to passenger railroads, AAR noted that the time available to work would be significantly reduced for passenger railroad employees working split-shifts, such that this common scheduling practice would not be possible in many circumstances. Finally, AAR discusses how a “continuous lookback” approach would make current practices, such as setting back calls (either through a call-and-release or an early release) or calling a large number of employees to find one willing to take an earlier

assignment, such as when an employee marks off sick, infeasible.

BLET and UTU submitted a joint comment arguing that the “continuous lookback” approach would negatively affect both safety and the financial well-being of employees. Because the Proposed Interpretation would include call times in the 14-hour period following 10 hours of rest, BLET and UTU argue that railroads would be given an incentive to minimize call times and thereby reduce an employee’s ability to schedule his or her rest. Employees would stand to lose substantial earning potential, BLET and UTU assert, because the maximum number of hours the employees may work would be limited to effectively less than the 12 consecutive or aggregate hours authorized by the statute, especially when taking into consideration call times, and the possible use of periods of interim release. The unions also assert that the “continuous lookback” approach does not resolve the problem that they see with railroads continually calling employees who have regular times to report for duty. Finally, BLET and UTU echo the concerns expressed by BRS and AAR that the “continuous lookback” approach would be too difficult to administer, both in terms of compliance and enforcement.

APTA’s comment agrees with the views expressed by BRS, AAR, BLET and UTU discussed above, arguing that the “fresh start” interpretation is now the only valid interpretation due to Congressional inaction, and repeating the argument that Sec. 21104(c), which deals with emergencies, would be voided by the “continuous lookback” approach.

Commenters in favor of the “continuous lookback” approach note that an employee can be more rested if that individual has the information to know when he or she will next be expected to report for duty. The hope of these commenters is that the “continuous lookback” approach would induce railroad carriers to provide employees with a 10-hour call time and therefore allow those employees to appropriately plan their rest so that they are rested immediately prior to the coming on-duty period. However, in light of the comments received from AAR, APTA, BLET, and UTU, FRA is deeply concerned that railroads would instead shorten call times as much as practicable in order to maintain flexibility in scheduling crews in spite of the “continuous lookback.” Shortened call times would leave employees in the same informational deficit as presently exists, but with even

less of an opportunity to engage in strategic napping to mitigate fatigue. This outcome would result in more fatigue for railroad workers, and is therefore inconsistent with Congress’s clear goal of improving railroad safety by reducing fatigue among railroad employees.

Several commenters in favor of the “continuous lookback” further suggest that FRA act to prohibit railroad carriers from making optional duty calls to employees who do not wish to accept an assignment other than their regularly-scheduled assignment. That idea would require FRA to promulgate a new regulation, and is therefore outside the scope of FRA’s present effort to interpret the text of the statute as most recently amended by the RSIA.

As was discussed above, commenters also highlighted a number of implementation issues in the potential use of the “continuous lookback” interpretation. While these difficulties are not insurmountable, they are nonetheless important to consider. FRA has an interest in keeping the burden of complying with the hours of service laws as low as possible while achieving the safety goals mandated by Congress. Given the uncertain effect of the “continuous lookback” on railroad safety, FRA believes it is not currently reasonable to impose such a significant burden on the regulated community.

In addition, minor changes to the statute over time also demonstrate Congress’s acceptance of FRA’s “fresh start” interpretation. In the 1978 amendments to the Hours of Service Act, Congress added a definition of the “24 hour period” within which a signal employee may work. The statute explicitly defined the period as beginning “when an individual reports for duty immediately after he has had at least eight consecutive hours off duty.” Federal Railroad Safety Authorization Act of 1978, Public Law 95–578, 92 Stat. 2459 (Nov. 2, 1978). The amendment adding the language was referred to in the relevant committee report as “principally \* \* \* technical amendments which would have the effect of making the statute more certain of application.” H.R. Rep. No. 95–1176, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5499, 5505. This addition reflects Congressional approval of FRA’s pre-existing interpretation of a parallel provision in the section applicable to train employees, then codified at 45 U.S.C. 62, to apply in a similar manner. This language was stripped from the statute in the RSIA. This change is best understood as a reflection of Congress’s judgment that the paragraph was redundant given the 1994

<sup>3</sup> “Call time” is the amount of prior notice that an employee receives from the railroad concerning when he or she must next report to duty. The minimum necessary call time is usually the subject of collective bargaining.

recodification's increased symmetry between the "train employee" section, now codified at 49 U.S.C. 21103, and the "signal employee" section, now codified at 49 U.S.C. 21104. The plain language continues to be ambiguous on the question of within which period the required rest time may be found. In light of FRA's longstanding and consistent construction of the hours of service laws as requiring rest at some point in the 24 hours prior to initiating an on-duty period, leaving that ambiguity intact signals Congressional approval for FRA's interpretation. Additionally, nothing in the legislative history of the RSIA reflects an intent to upset the existing interpretation, and the "fresh start" interpretation remains a reasonable reading of the plain language of the statute.

FRA has decided that these arguments against the "continuous lookback" approach discussed above merit remaining with the current "fresh start" interpretation. At this time, it appears from the comments that the effect of a "continuous lookback" on safety may well be to increase fatigue. The proposed interpretation is therefore less consistent with the goals of Congress in enacting the original Hours of Service Act, subsequent amendments, recodification, and the RSIA amendments to increase railroad safety by reducing fatigue. Additionally, small changes to the statute support the position that Congress has given its imprimatur to FRA's existing "fresh start" interpretation. Finally, implementation of the "continuous lookback" at this time would be so difficult as to make the interpretation unjustified in light of its speculative safety benefits. For all of these reasons, FRA concludes that under the current circumstances, its longstanding interpretation of "the prior 24 hours" as a reference to a 24-hour period prior to reporting for duty, the "fresh start" interpretation, remains the most reasonable reading of the statute, and thus FRA will keep that interpretation in place.

#### *B. Questions Regarding the "Consecutive-Days" Limitations for Train Employees and Requirement of 48 or 72 Hours Off Duty at the Home Terminal*

1. What constitutes a "Day" for the purpose of sec. 21103(a)(4)?

In general, Sec. 21103(a)(4) prohibits a railroad from requiring or allowing a train employee to go on duty or remain on duty after an employee has "initiated an on-duty period each day for \* \* \* six consecutive days" until the

employee has had 48 hours at his or her home terminal unavailable for any service for any railroad carrier. In limited circumstances, the employee is instead allowed to work seven consecutive days, but must then have 72 hours at the employee's home terminal unavailable for any service for any railroad carrier before going on duty as a train employee. *Id.* As presented, the word "day" is sufficiently ambiguous that the statute is unclear as to whether this requirement for extended rest (48 consecutive hours) is triggered by initiating an on-duty period on six consecutive calendar days or six consecutive 24-hour periods. In the Interim Interpretation IV.B.1,<sup>4</sup> FRA stated that "[a]lthough arguments could be made for either interpretation of this language, FRA interprets this provision as related to initiating an on-duty period on 6 or 7 consecutive calendar days."

In consideration of the comments received on this Interim Interpretation, the nature of the railroad industry, and additional fatigue considerations that have become more apparent with the implementation of this Interim Interpretation, FRA has determined that the negative consequences flowing from defining "day" as a calendar day for the purpose of Sec. 21103(a)(4) overcome the minor administrative benefits noted by FRA in the Interim Interpretation. Accordingly, for the reasons described below, effective May 29, 2012, FRA will construe "day" in this section to refer to a 24-hour period. Specifically, FRA will view the statutory "day" to be the 24-hour period that ends when the employee is finally released from duty and begins his or her statutory minimum off-duty period; any new initiation of an on-duty period at any point during the 24-hour period following the employee's prior final release will have been initiated on a day consecutive to the prior duty tour, which will continue the series of consecutive days. On the other hand, if the employee does not initiate an on-duty period during the 24-hour period following the employee's prior release, then that 24-hour period breaks the consecutiveness of the days in the series.

As described above, the statutory provision requires that, when an employee "has initiated an on-duty period each day for \* \* \* 6 consecutive days," that employee must have 48 hours of time off duty, with some exceptions allowing for a seventh consecutive day. FRA's Interim Interpretation of the provision established the period that would

constitute a day for purposes of determining whether an on-duty period had been initiated on consecutive days as synchronized with the calendar day, such that each statutory day would begin and end at midnight. Having eliminated this reference point, FRA considered two options for reference points for the beginning and ending of a 24-hour day as related to an employee's duty tour and statutory minimum off-duty period: Either (1) having the day begin at the initiation of the employee's duty tour or (2) having the day end at the conclusion of the employee's duty tour.

The implication of the choice lies in what it means for initiations of on-duty periods to be "consecutive" with one another. In the former possible definition (where the day begins with the initiation of an on-duty period), the next consecutive day would begin 24 hours after the employee's initiation, and continue for another 24 hours, such that an employee's duty tours would be deemed "consecutive" whenever the initiations of the respective on-duty tours were separated by less than 48 hours (regardless of how much of the period was time on duty, time off duty, or time that is neither on duty nor off duty (i.e., limbo time)). By contrast, in the latter possible definition (where the day ends with the employee's final release and the conclusion of the duty tour), the next consecutive day would begin at the employee's final release and continue for another 24 hours, such that an employee's duty tours would have been initiated on consecutive days when the initiation of an on-duty period is less than 24 hours from the employee's prior final release from duty.

FRA believes both of these understandings of a 24-hour day to be reasonable understandings of what "day" means in this context. In choosing between the two definitions, FRA noted that the amount of time necessary to end a series of consecutive days if the day began with the initiation of an on-duty period would be highly variable. In particular, the length of time not on duty that would be required to break a series of consecutive days would range from 47 hours and 59 minutes to 24 hours (depending on the length of the prior duty tour), with the peculiar result that the amount of off-duty time necessary to end the series would decrease as the prior duty tour length increased. Although the end of the consecutive day would be fixed as soon as an employee returned to work as 48 hours later, the variable length of time not initiating an on-duty period that would be required to avoid continuing the series of consecutive days, which

<sup>4</sup> 74 FR 30665, 30673 (June 26, 2009).

would not be known until the duty tour ended, would likely lead to employee confusion as to the application of the laws. If the day instead ends with the employee's final release, a period of 24 hours not on duty is always both necessary and sufficient to end the series of consecutive days, providing some level of administrative efficiency while avoiding the negative consequences that result from the use of a calendar day, that were discussed in comments on the interim definition of "day" as a calendar day.

The vast majority of commenters, including the BLET and UTU in their joint comment, argue against the "calendar day" interpretation as inconsistent with existing railroad practice and harmful to railroad workers who will be unable to work previously acceptable schedules, and, as a result, they will earn less money.<sup>5</sup> BLET and UTU argue that a 24-hour period of time off duty should be considered a break in the count of consecutive days, due to "the severe effects that will flow from the current interim interpretation."

The economic effects of the Interim Interpretation are discussed in detail in a comment submitted by an individual, which includes a schedule of trains for one crew in Needles, CA. The schedule appears to demonstrate that an individual working on a regular pool job may lose as much as \$1,140 in an average month by operation of the "calendar day" interpretation, though this chart does not take into account the new requirement of having 10 hours of uninterrupted rest, rather than 8 hours of rest, as was the requirement prior to the RSIA. In addition, many individual commenters note that railroads grant personal leave "days" as a 24-hour block of time, rather than a calendar day. Other commenters note that a "day" can refer to any continuous 24-hour period. Another commenter describes how railroad carriers can adjust call times slightly so that an on-duty period is not initiated until the next calendar day, thus breaking the string of consecutive days, in order to prevent employees from being required to have the mandatory rest. Commenters also express concern about how the "calendar day" interpretation impacts employees whose service falls on two calendar days, such that they have initiated an on-duty period on one calendar day, while performing substantial service on the next calendar day, in which they may not initiate an

on-duty period, which would end the string of consecutive days.

The comments, as well as FRA's oversight of compliance with the hours of service laws since the RSIA's effective date, also raise fatigue concerns with the "calendar day" interpretation. Railroads, as well as some train employees, may seek to maximize employees' availability to perform service by scheduling such that the employee never reaches the point of having initiated an on-duty period on six consecutive days, and, therefore, 48 hours of time off duty is never required. In some cases, such practices can limit cumulative fatigue by allowing employees to have significant amounts of time off prior to reaching six consecutive days initiating an on-duty period. In some cases, however, the calendar day interpretation allows for a break in the series of consecutive days by shifting an employee's initiation of an on-duty period relatively slightly. For example, if an employee would normally be available for service at 11 p.m., and had not previously initiated an on-duty period on that calendar day, a railroad may rationally decide that it is in its interest to delay calling that employee to report for duty, allowing that employee to report for duty at least an hour later, so that the employee does not initiate an on-duty period on that calendar day, thereby restarting the count of consecutive days before that employee is required to have 48 hours of time off duty.

Because the statutory text clearly refers to the "initiation" of an on-duty period rather than the breadth of an on-duty period, it is possible for an employee to be within a duty tour for the majority of a calendar day and yet not have initiated an on-duty period on that calendar day. For instance, an employee who initiates an on-duty period on Monday evening at 11:15 p.m., is on duty for 12 hours, and then has a 2-hour deadhead to final release would be finally released at 1:15 p.m. on Tuesday afternoon. With a statutory minimum off-duty period of 12 hours (as a result of the additional rest required by Sec. 21103(c)(4)), such an employee could lawfully next initiate an on-duty period no earlier than 1:15 a.m. on Wednesday. Despite spending the majority of Tuesday in a duty tour for the railroad, this employee would be deemed to have broken his or her series of consecutive days, and could lawfully initiate a duty tour on at least another six consecutive days before being provided with the required 48 hours of time off duty. This consequence is all the more pernicious when considering that the transition from one calendar

day to the next occurs overnight, when individuals are generally at the greatest risk for fatigue. The result is that the "calendar day" interpretation of Sec. 21103(a)(4) as presently written would provide the greatest latitude for minor changes in an employee's report for duty time to dramatically reduce the required rest for precisely those employees who are at the greatest risk for fatigue. While FRA continues to believe that defining "day" as "calendar day" remains reasonable in the abstract, these fatigue concerns, in addition to the issues described above, lead FRA to conclude that defining "day" as the 24-hour period measured from the time of the employee's prior final release is not only reasonable but preferable.

Finally, FRA notes that the "24-hour day" interpretation of Sec. 21103(a)(4) described above is distinct from the recently issued final rule governing the hours of service for train employees providing intercity and commuter passenger rail transportation (passenger train employees). 76 FR 50360 (August 12, 2011). The cumulative fatigue limitations for passenger train employees are explicitly defined such that the relevant series of days are "consecutive calendar days." 49 CFR 228.405(a)(3). This distinction is appropriate given the different structure of passenger and freight rail transportation as well as the specific characteristics of the passenger train employees' hours of service regulation. Passenger rail transportation tends to have more regular schedules than freight rail transportation, with many passenger train employees working during the day for five to six days a week. FRA would also expect that passenger trains would be less susceptible to having their schedules adjusted on an ad-hoc basis in a way that would affect the application of the regulation to a specific employee with respect to a consecutive-day limitation. Additionally, the structure of the passenger train employees' hours of service regulation provides additional rest requirements for employees working in the transition from one calendar day to the next. Any duty tour including time on duty between 8 p.m. and 4 a.m. is considered a Type 2 assignment, which requires a more stringent limitation on the number of days within a series on which an on-duty period may be initiated, unless the schedule is analyzed using a biomathematical model of performance and fatigue and is thereby shown not to present an unacceptable level of risk for fatigue, and the schedule otherwise meets the criteria to be a Type 1

<sup>5</sup> In contrast, in a separate comment, the Georgia State Legislative Board of BLET favored the "calendar day" interpretation, though its comment does not provide any additional detail beyond its statement of support.

assignment. In addition, any duty tour including time on duty between midnight and 4 a.m. is categorically a Type 2 assignment. Therefore, assignments that cover a period of time spanning two calendar days will be subject to the additional limitations of Type 2 assignments. These factors made the use of calendar days appropriate in the overall regulatory scheme for passenger train employees' hours of service, but do not favor the reading of "day" to mean calendar day in the statutory provision applicable to freight rail transportation.

2. What "Work" may an employee do on a seventh consecutive day under sec. 21103(a)(4)(A)?

The statute provides that a train employee may "work a seventh consecutive day" under certain limited circumstances, and requires that employee to have 72 hours off duty at the employee's home terminal before returning to duty after "working" the seventh day. In Interim Interpretation IV.B.3,<sup>6</sup> FRA asserted that Congress's choice of a different word ("work"), rather than continuing to use the "initiate an on-duty period" construction, implied a different meaning for that word, so that if an employee did not initiate an on-duty period, but performed other service for the carrier on the seventh consecutive day, after six consecutive days of initiating an on-duty period, the string of consecutive days would not have been broken, and the employee would be required to have the 72 hours off duty that would be required after seven consecutive days. In response to comments received on this Interim Interpretation, and in consideration of the confusion caused by this interpretation, FRA now interprets "works" in Sec. 21103(a)(4)(A)(ii) to be synonymous with "initiates an on-duty period."

The BLET and UTU joint comment argues against the Interim Interpretation that considered "work" as a different word with a different meaning. The unions assert that, because time spent deadheading from a duty assignment to the point of final release is neither time on duty nor time off duty, FRA's including such deadheading in the definition of "work" is inconsistent with the clear statutory provision, at 49 U.S.C. 21103(b)(4) (unchanged by the RSIA) defining "time spent in deadhead transportation from a duty assignment to the place of final release" as "neither time on duty nor time off duty." Thus, BLET and UTU contend that if the only

service an employee performs on the seventh consecutive day is deadheading, separate from any covered service, the string of consecutive days should be broken, just as it would if the deadhead transportation had occurred on the sixth consecutive day<sup>7</sup> or any other day in the sequence of consecutive days. The comment also notes FRA's admission of construction problems in other portions of the statute.<sup>8</sup> Finally, the comment claims that this interpretation leads to absurd results when combined with Interim Interpretation IV.B.6,<sup>9</sup> which allows rest at an away-from-home terminal to break consecutiveness and thereby require only 48 hours of rest after a deadhead home. The Georgia Legislative Board of the BLET concurs, arguing that such deadheading should categorically not be counted as a "day" for the purpose of this section.

Despite the interpretive canon that statutes should be construed with attention to Congress's choice to use different words in the same statute, FRA concludes, for the reasons described in this section, that to "work" and to "be on duty" are sufficiently related concepts to infer that Congress chose the former over the latter out of stylistic preference (to avoid repetitive language) and not to adjust the substantive scope of the provision. This reading of the text preserves the parallelism between Sec. 21103(a)(4)(A)(i) and subsection (a)(4) generally, in that subsection (a)(4)(A)(i) allows an employee to "work" a seventh consecutive day notwithstanding subsection (a)(4)(A)'s rest requirement after initiating an "on duty period" for the prior six consecutive days. This interpretation of the text is also supported by FRA's interest in avoiding a needlessly complex reading of the statute. FRA notes that there has been confusion among railroads and employees, about the fact that under the Interim Interpretation, deadheads were treated differently on different days.

<sup>7</sup> BLET and UTU point out that FRA acknowledged this outcome on the sixth consecutive day in the interim interpretations. 74 FR 30665, 30673 (June 26, 2009).

<sup>8</sup> Specifically, the comment refers to the fact that the language of the statute would not allow an employee to be deadheaded back to his or her home terminal, if that employee had exceeded the 276-hour monthly cap in 49 U.S.C. 21103(a)(1), which includes time spent awaiting and in deadhead transportation from a duty assignment to the place of final release.

<sup>9</sup> 74 FR 30665, 30674 (June 26, 2009).

3. Does a day spent deadheading, with no other covered service performed on that day, constitute an "Initiation of an On-Duty Period" for the purposes of sec. 21103(a)(4)?

In order for an employee to be required to have 48 consecutive hours off duty at the employee's home terminal, that employee must first have initiated an on-duty period each day for six consecutive days. Several commenters express concerns over how this language will be interpreted with regard to days on which the only service performed for the carrier is deadhead transportation. Because such time is not time on duty, it cannot be considered the "initiation of an on-duty period" and therefore does not independently count toward the continuation of a series of consecutive days.

The statute defines two types of deadheading relating to time on duty as a train employee. In Sec. 21103(b)(4), the hours of service laws establish that time spent in deadhead transportation to a duty assignment, i.e. a "deadhead to duty," is time on duty, but that deadhead transportation from a duty assignment to the place of final release, i.e., "deadhead from duty," is neither time on duty nor time off duty. However, because these definitions are only in reference to determining time on duty, the statute is silent about a third type of deadheading, where the deadhead transportation is separated from any covered service by at least a statutory minimum off-duty period both prior to and following the deadhead transportation. Such "stand-alone deadheads" are not time on duty as an employee in such a deadhead is not engaged in or connected with the movement of a train, nor is the time spent in such deadhead transportation within the same 24-hour period as other covered service with which it could commingle.

The Nebraska State Legislative Board of the UTU argues that FRA's understanding of deadheading as not "initiating an on-duty period" for the purpose of Sec. 21103(a)(4) is inconsistent with the intent of the RSIA, and therefore should be replaced by a regulation that classifies all deadheading as time on duty and therefore prevents a railroad from deadheading an employee to break the contiguousness of workdays. Individuals commenting on the matter agree, arguing that permitting deadheading to interrupt the counting of consecutive days will allow railroads to strategically use deadheading to prevent train employees from having a day off; however, the promulgation of new

<sup>6</sup> 74 FR 30665, 30673-74 (June 26, 2009).

regulations is outside the scope of this interpretation.

The lone commenter speaking to the issue and arguing against considering deadheading to count as initiating an on-duty period, the Georgia State Legislative Board of the BLET notes that the definition of “time on duty” in the statute categorically excludes deadheading to a place of final release, and therefore would preclude FRA from considering deadheading that is the only service performed on a given day to count as initiating an “on-duty period.”

FRA will continue to apply its longstanding interpretation of deadheading that commingles with a period of covered service, which is consistent with the language of the statute at 49 U.S.C. 21103(b)(4). If an employee deadheads to duty at the beginning of a duty tour, time spent in the deadhead is time on duty, and therefore the beginning time of the deadhead to duty constitutes the initiation of an on-duty period for the purposes of Sec. 21103(a)(4). In contrast, where an employee deadheads to a point of final release as the last activity in a duty tour, the deadhead remains neither time on duty nor time off duty. However, because the deadhead follows other service within the duty tour, the employee would necessarily have initiated an on-duty period earlier that day when beginning to perform covered service or commingled service.

In circumstances where an employee has a stand-alone deadhead, there must necessarily be no time on duty associated with the deadhead transportation; if there were time on duty not separated from the deadhead by at least a statutory minimum off-duty period, the deadhead would therefore have to be either a deadhead to duty or a deadhead from duty. Because stand-alone deadhead transportation is most comparable to other service outside the definition of covered service, the time spent in stand-alone deadhead transportation will be treated as any other non-covered service for the carrier, and therefore will not constitute the initiation of an on-duty period under Sec. 21103(a)(4) when not commingled with covered service. In light of FRA’s interpretation in section IV.B.2, above, such stand-alone deadheads will be treated consistently, as breaking the continuity of the consecutive days, regardless of the day in the string of consecutive days on which the deadhead occurs.

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)?

Yes. The statute provides (unchanged by the RSIA) that “[t]ime on duty begins when the employee reports for duty, and ends when the employee is finally released from duty.” 49 U.S.C. 21103(b)(1). Consistent with this language, longstanding FRA interpretations provide that, if a railroad calls an employee to report to perform covered service and the employee reports for that covered service assignment, the act of reporting is itself time on duty. Federal Railroad Administration, Hours of Service Interpretations, Operating Practices Technical Bulletin OP–04–29 (Feb. 3, 2004). It follows that a train employee who reports for duty but is then released before performing any substantial duties is still considered to have accrued time on duty. Accordingly, as FRA stated in the Interim Interpretation, such an employee has “initiated an on-duty period” under Sec. 21103(a)(4). In the case where an employee is released from the call to perform duty (that is, the employee is no longer expected to report for duty at the previously established report time) prior to the time that the employee is scheduled to report, then the employee has not reported, regardless of whether the employee is at the location to which he or she was called to report, and, if the employee has not performed any covered service, the employee will not have accrued any time on duty or initiated an on-duty period.<sup>10</sup> FRA sees nothing in the statute that would support a change in this interpretation. As a result, an employee who reports for duty and is immediately released has initiated an on-duty period, and that duty tour will not end until the employee is finally released to a statutory minimum off-duty period.

The BLET and UTU joint comment notes a supposed consequence of FRA’s longstanding interpretation of the statute. On days one through five, an employee would be considered to have initiated an on-duty period for that day, regardless of whether the employee actually performed covered service. On day six or seven, the comment argues, a train employee who reports for duty to perform covered service and is released from duty shortly thereafter would not have the opportunity to be called to perform additional service within that 24-hour period, because of the requirement for 48 or 72 hours of

rest. The comment implicitly raises the issue of when the 48 or 72 hours of rest would begin for employees who have an early release after initiating an on-duty period on their sixth or seventh consecutive day.

The unions seek an interpretive rule that would not further limit a train employee’s availability under the law to work, on the grounds that such extended rest is not warranted due to the minimal amount of time spent on duty on the sixth consecutive day. The unions argue, as does the Georgia State Legislative Board of BLET, that it is “manifestly unjust” for a train employee to be forced into the 48 or 72 hours of mandatory rest after an on-duty period lasting only minutes. Instead, they hope for FRA to interpret “initiate an on-duty period” not to include a small period of duty time. The joint BLET/UTU comment notes that in these situations, “little if any covered service is actually performed, except, perhaps, for a limited amount of administrative duties.”

The unions are correct that the language of Sec. 21103(a)(4) could be read to prohibit a railroad from requiring or allowing an employee to return to work after an early release on his or her sixth consecutive day of initiating an on-duty period, unless the employee has had 48 consecutive hours off duty unavailable for any service for any railroad carrier. If FRA were to take a very literal reading of Sec. 21103(a)(4), then if a train employee is immediately released after initiating an on-duty period for a sixth consecutive day, the train employee would not be allowed to return to duty until the 48-hour rest requirement had been fulfilled. FRA believes that this is obviously not the proper reading of the statute.

As was noted above, Sec. 21103(b)(1), which defines time on duty generally, provides that “[t]ime on duty \* \* \* ends when the employee is finally released from duty.” (Emphasis added.) In addition, Sec. 21103(a)(4)(A)(i) allows an employee to “work a seventh consecutive day if that employee completed his or her final period of on-duty time on his or her sixth consecutive day at a terminal other than his or her home terminal.” This would not be possible if the 48 hours off duty were required immediately after the initiation of an on-duty period on the sixth consecutive day. The plain language of the statute clearly permits an employee to perform service on his or her sixth consecutive day, demonstrating that the very literal interpretation is flawed. As demonstrated by Congress’s treatment of the provision, the other statutory

<sup>10</sup> 74 FR 30665, 30673 (June 26, 2009).

language, and the interpretation of all commenters, the 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). Having established when the extended-rest requirement is activated, an employee subject to an early release may return to work without violating Sec. 21103(a)(4) so long as he or she has not “finally” been released from duty. If the employee returns to work, whether in a single period of time on duty or after an interim release period, that employee has not been “finally” released from duty and, therefore, is not yet subject to the extended-rest requirement. When the employee is finally released from duty, the employee must be given the statutory minimum off-duty period (normally, 10 consecutive hours) as well as the extended-rest period, both of which will begin to run concurrently.<sup>11</sup>

With respect to the request for an exception for employees who perform little covered service after reporting for duty, these employees will continue to be considered to have initiated an on-duty period, even if they did not perform any substantial amount of covered service within that period. Time on duty begins when an employee reports for duty; therefore, when an employee reports for a covered service assignment as a train employee, he or she has reported for duty, thus initiating an on-duty period, even if he or she does not perform any additional covered service in that on-duty period. Accordingly, the amount of covered service performed within the period is irrelevant for determining whether the employee initiated an on-duty period.

5. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?

As discussed above, an employee only initiates an on-duty period if the employee accrues time on duty. As such, if the employee is called for duty but does not report, such as if the employee is released prior to the report time in a call and release, the employee

has not initiated an on-duty period. However, if the employee has reported for duty, the employee has accrued time on duty and therefore has initiated an on-duty period.

6. Does an employee’s performance of “Other Mandatory Activity for the Carrier” that is not covered service ever count as the initiation of an on-duty period under sec. 21103(a)(4)?

Yes, but only if the non-covered service commingles with covered service. In Interim Interpretation IV.B.4, FRA asked the question, “Does Attendance at a Mandatory Rules Class or Other Mandatory Activity That Is Not Covered Service But Is Non-Covered Service, Count as Initiating an On-Duty Period on a Day?” FRA answered that question in the negative, but did note if this non-covered service were to commingle with covered service (meaning it was not separated from covered service by a statutory minimum off-duty period) then initiation of the non-covered service activity would qualify as initiation of an on-duty period, because the commingled service, in this case, becomes time on duty.<sup>12</sup>

The Nebraska State Legislative Board of the UTU expresses concern that, by not counting as a “day” attendance at mandatory rules classes or other similar mandatory activity that is non-covered service for the purposes of determining whether a train employee initiated an on-duty period, train employees may be required to participate in a rules class for several hours and then immediately be pressed into 12 hours of covered service.

The above-described scenario is not an implication of not counting “other mandatory activity” as “initiating an on-duty period” under Sec. 21103(a)(4), and is not permissible under the hours of service laws, neither as they existed before the RSIA, nor as amended by the RSIA. The commenter appears to be under the impression that, by not treating non-covered service as an “initiation” for the purposes of Sec. 21103(a)(4), that implies that time spent in non-covered service does not commingle with covered service if not separated from it by at least a statutory minimum off-duty period; however, this is not the case. As stated in the Interim Interpretations, the commingling of covered and non-covered service continues to function as it did prior to the RSIA. This interpretation, that attendance at a rules class, or other non-covered service may break a string of consecutive days, will only apply if an employee has a statutory minimum off-

duty period between the non-covered service and the covered service both preceding and following it, meaning that there is no covered service to commingle with the non-covered service; in such a situation, the non-covered service would not constitute the initiation of an on-duty period because no “time on duty,” as defined in Sec. 21103(b), was incurred. However, when there is not a statutory minimum off-duty period between non-covered service and covered service, the non-covered service commingles and is time on duty that can be considered as an initiation of an on-duty period.

7. How much rest must an employee have after initiating an on-duty period for six consecutive days, if permitted to do so for seven consecutive days by sec. 21103(a)(4)(B)?

As a general rule, Sec. 21103(a)(4) allows a train employee to initiate an on-duty period on only six consecutive days. However, Sec. 21103(a)(4)(B) (Subparagraph (B)) allows an employee to initiate an on-duty period on a seventh consecutive day under limited circumstances as provided in clauses (i) through (iii) of Subparagraph (B). The structure of the statute does not make it readily apparent to some readers how Subparagraph (B) interacts with Sec. 21103(a)(4)(A) (Subparagraph (A)). FRA reads these subparagraphs to apply jointly, so that a train employee who is permitted to initiate on-duty periods on 7 consecutive days must have 48 hours of time unavailable for any service for any railroad carrier if that employee instead initiates on-duty periods on only 6 consecutive days.

One commenter expresses concern over the interaction between Subparagraphs (A) and (B). He argues that employees who meet one of the conditions in Subparagraph (B)(i)–(iii) are exempt from Subparagraph (A) and, therefore, may work six consecutive days without being required to receive 48 hours off.

Congress did not specifically indicate whether Subparagraph (B) is intended to be an additional rule alongside Subparagraph (A), or instead is a replacement for Subparagraph (A) when Subparagraph (B) is applicable. The comment asserts that, because Subparagraph (B) does not specifically apply Subparagraph (A) to those employees who are permitted to initiate an on-duty period on a seventh consecutive day, the two were intended to be construed as distinct alternative regimes. The statute does, however, contain some language suggesting both provisions should apply in parallel. In addition, nothing in the legislative

<sup>11</sup> In a separate future publication in which FRA adopts several new interim interpretations and requests comment on the new interim interpretations, FRA plans to include a more detailed discussion of the idea of that multiple required off-duty periods run concurrently as opposed to consecutively.

<sup>12</sup> 74 FR 30665, 30674 (June 26, 2009).

history demonstrates an intention for Subparagraph (B) to trump Subparagraph (A), and policy considerations support the application of both subparagraphs to individuals.

Had Congress intended for Subparagraph (B) to be an exception from Subparagraph (A), the effect of Subparagraph (B) should be to allow employees to initiate six consecutive on-duty periods without requiring a 48-hour mandatory rest period (sometimes referred to as a "6/1 schedule"), as well as allowing those employees to work a seventh consecutive day with a longer mandatory rest period to follow before returning to train service as provided by the statute. Congress specifically included a separate waiver process in Sec. 21103(a)(4), suggesting that Subparagraph (B) should be read as something other than an exemption from the general rule of Subparagraph (A), and in some instances FRA has used this waiver authority to allow employees to initiate an on-duty period on six consecutive days followed by one day free of initiation of an on-duty period. In addition, the introductory clause of Subparagraph (B) ("except as provided in subparagraph (A)") contemplates both paragraphs applying to individual employees, by allowing some individuals to initiate a seventh consecutive day despite not meeting the requirements of Subparagraph (B). The clause would not be necessary if the statute were structured with Subparagraphs (A) and (B) as mutually exclusive.

The paragraph structure of the statute could instead be viewed as a basis for reading their "or" disjunction as exclusive, meaning that only one subparagraph or the other could apply to a single employee, but not both, but this argument is unpersuasive. While there may have been more straightforward ways of structuring the requirements of Subsection (a)(4), the structure is consistent with the style of Subsection (a) of Sec. 21103 as a whole. While Subparagraphs (A) and (B) (in Section 21103(a)(4)) are certainly more complicated than Subsection (a)(1)(A) through (C), the logical arrangement of the disjunction is the same. In both, related statements are split into multiple subparagraphs, joined by the word "or." It is readily apparent that the types of service listed in Subsection (a)(1)(A) through (C) are not mutually exclusive; for instance, counting time on duty as part of the 276-hour limit does not prevent also counting time waiting for deadhead transportation as part of that limit. Subparagraphs (A) and (B), despite their additional complexity, should be read similarly. This

understanding is furthered by stripping the separate paragraphs of their designations and then combining their text into the one extremely long sentence that they comprise. That sentence reads, in relevant part, "a railroad carrier \* \* \* 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 for 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty \* \* \* or, except as provided in subparagraph (A), 7 consecutive days, unless that employee has had at least 72 consecutive hours off duty \* \* \*." When read in context, the clauses lend themselves to an inclusive disjunction (including one of the subparagraphs, the other, or both) rather than exclusive disjunction (either one of the subparagraphs or the other, but not both), indicating that both clauses may apply to a single individual.

Considering all of these factors, the most reasonable reading of the statute is that Sec. 21103(a)(4)(A) continues to apply to a train employee who is permitted to initiate seven consecutive on-duty periods by Sec. 21103(a)(4)(B). Therefore, any train employee who initiates six consecutive on-duty periods will be required to have had at least 48 hours unavailable for any service for any railroad carrier at the employee's home terminal before being allowed to go on duty again as a train employee, though a train employee in certain circumstances is permitted to initiate a seventh consecutive on-duty period and afterwards must have 72 hours unavailable for any service for any railroad carrier at the employee's home terminal before returning to duty as a train employee.

#### 8. How are initiations of on-duty periods for multiple railroad carriers treated under sec. 21103(a)(4)?

Prior to the RSIA, the hours of service laws did not restrict, in any way, an employee's activities during periods of off-duty time. Thus, FRA did not have the statutory authority to penalize either a railroad, or an employee, if an employee worked at a second job during his or her statutory off-duty period. The employee was not required under the hours of service laws to report time spent in the second job to the railroad, regardless of whether the second job was for another railroad, or outside the railroad industry, and the railroad was only responsible for ensuring that the employee did not perform service for the railroad during the required statutory off-duty period. FRA recommended legislative amendments

to address situations of dual employment, but they were not adopted.<sup>13</sup>

The RSIA did not change the application of the hours of service laws to employees working for multiple railroads, except as to the provision that it added to the statute requiring an extended off-duty period of 48 hours after an employee has initiated an on-duty period for six consecutive days. Section 21103(a)(4) specifies that during the 48- or 72-hour off-duty period at the employee's home terminal, "the employee is unavailable for any service for any railroad carrier." The language indicating that the employee must be unavailable for any service for any railroad carrier was not added to any of the other periods of off-duty time provided for in the statute.

AAR, in its comment, requests that FRA clarify the hours of service reporting and recordkeeping obligations as to service performed for other railroads, arguing that only service performed for other railroads during the extended rest period required by Sec. 21103(a)(4) needs to be reported. In addition, one individual commenter asks whether an employee will be required to provide information to each railroad for which he or she performs service, regarding consecutive days of covered service or service towards the 276-hour monthly limitation. Another individual commenter asks if a train employee may indefinitely work a schedule of five days for one railroad carrier and two days for a different railroad carrier.

With respect to the reporting and recordkeeping requirements for service for other railroads, FRA disagrees with AAR's statement that information on service for other railroads is "irrelevant from the perspective of railroad compliance with the hours-of-service requirements." The hours of service laws impose duties directly on railroad carriers and their officers and agents; "a railroad carrier and its officers and agents may not require or allow a train employee" to go or remain on duty in the circumstances stated in the statute

<sup>13</sup> On April 1, 1998, the Secretary submitted to the 105th Congress proposed legislation entitled the Federal Railroad Safety Authorization Act of 1998, which included provisions that would amend the hours of service laws to address train, signal, and dispatching service employees employed by more than one railroad. The legislation was introduced by request in the House of Representatives on May 7, 1998 as H.R. 3805 and in the Senate as S. 2063 on May 12, 1998, and was not adopted. On July 26, 1999, the Secretary submitted to the 106th Congress proposed legislation entitled the Federal Railroad Safety Authorization Act of 1999, which also included provisions on such dual employment. This legislation was never introduced and lapsed at the end of that Congress.

and unless the stated conditions are met. Sec. 21103(a). In order to comply with the hours of service laws, a railroad must inquire of each of its train employees as whether he or she has performed any service for any other railroad, during any 48 or 72 hours between the employee's final release from the duty tour triggering the rest requirement and the next time the employee reports for duty as a train employee.

If a railroad does not seek to collect information from its employees indicating when they perform service for other railroad carriers, that railroad will be unable to fulfill its obligation not to require or allow an employee who has initiated on-duty periods on six or seven consecutive days to remain or go on duty without the 48 or 72 hours free of any service for any railroad. Therefore, as indicated in the Interim Interpretations, "[i]t will be the responsibility of the railroad to require employees to report any service for another railroad. It will be the responsibility of the employee to report to inform each railroad for which the employee works of its service for another railroad."<sup>14</sup>

With regard to the question of whether employees will be required to provide information to each railroad for which they perform service, regarding consecutive days of covered service or service counted toward the 276-hour monthly limitation, as FRA stated in the Interim Interpretation, "[t]he employee will be required to record service for Railroad A on the hours of service record for Railroad B, and vice versa."<sup>15</sup>

However, as also indicated in the Interim Interpretations, FRA will only consider enforcement action for excess service where service for another railroad is performed during the 48 or 72 hours off duty that an employee must receive after initiating an on-duty period each day for six or seven consecutive days, because the hours of service laws do not address service for another carrier during the other required off-duty periods.<sup>16</sup> For this reason, when an employee chooses of his or her own volition to perform covered service as a train employee for multiple railroads, the only time the service for the second railroad will be relevant to the first (and vice versa) will be when that employee reaches six or seven consecutive days of initiating an on-duty period for one railroad.

Therefore, an employee would not need to provide a cumulative total of

time spent on multiple railroads for the purpose of compliance with the 276-hour monthly limitation. Likewise, an employee whose schedule required him to work five days followed by two days off could choose to work for another railroad during the two days off, because the employee had not yet initiated an on-duty period on six consecutive days, which would require a period of 48 hours during which the employee is unavailable for any service for any railroad carrier. Because the statute does not address employees working for multiple railroads, except during the required extended-rest period of 48 hours, it would not prohibit an employee's choice to work for a second railroad during off duty periods prior to triggering the extended rest requirement.

Finally, it should be noted that the statutory provision on hours of service civil penalties (49 U.S.C. 21303(a)(1)) provides that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." An employee of Railroad A who works for Railroad B as a train employee during the required 48- or 72-hour rest period and who then goes on duty as a train employee for Railroad A causes Railroad A to be in violation of Sec. 21103(a)(4) and is individually liable for causing the violation by Railroad A and therefore subject to enforcement actions, including disqualification from safety-sensitive service if the violation is found to demonstrate that the individual is unfit for such service. See 49 CFR part 209, appendix A. If the employee willfully caused the railroad to be in violation, the employee would be subject to liability for a civil penalty. 49 U.S.C. 21304. Additionally, an employee may be held individually liable for willful failures to maintain accurate hours of service records under 49 CFR 228.9 and 228.11, including records documenting service for multiple railroads.

9. Does an employee "Deliberately Misrepresent His or Her Availability" simply by reporting for duty on a consecutive day in violation of sec. 21103(a)(4)?

In the Interim Interpretations, FRA states that, in general, an employee will not face enforcement action from FRA for accepting a call to report for duty when the employee knows he or she is close to the 276-hour monthly limitation on service and may not have sufficient time remaining to complete the assignment or duty tour. This enforcement policy does not apply, however, where there is "evidence that the employee deliberately

misrepresented his or her availability."<sup>17</sup> In its comment, AAR asks that FRA hold employees jointly responsible for violating the hours of service laws when accepting a call to report in excess of the "consecutive-days" limitations. FRA declines to adopt AAR's proposal.

Given that FRA's enforcement policy with regard to its hours of service recordkeeping regulations allows railroads to keep data related to the limitations on consecutive days, monthly service, and limbo time in a separate administrative ledger, rather than tracking the information daily on the record for each individual duty tour, railroads are in the best position to know whether or not an employee may report for duty. In addition, an employee who refused to report for duty when called to do so could be subjected to discipline by the railroad, if, for example, the employee incorrectly calculated or misunderstood the application of the provision to his or her current sequence of consecutive days, and believed that the statute prohibited the employee from reporting for duty. Furthermore, while the penalty provision of the hours of service laws provides for individual liability in violations of the hours of service laws, the substantive restrictions operate on "a railroad carrier and its officers and agents." Employees have the obligation to provide accurate information to railroads regarding their service, and FRA will consider action as appropriate under the agency's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, 49 CFR part 209, appendix A, when employees fail to meet this obligation. Nonetheless, simply reporting for duty is insufficient to demonstrate that an employee "deliberately misrepresented his or her availability."

*C. Questions Regarding the Prohibition on Communication by the Railroad With Train Employees and Signal Employees*

In addition to increasing the statutory minimum off-duty period for train employees and signal employees to 10 hours, the RSIA requires that those 10 hours be uninterrupted by communication from the railroad by telephone, pager, or in any other way that could reasonably be expected to disrupt the employee's rest, except to notify an employee of an emergency situation. 49 U.S.C. 21103(e) (Sec. 21103(e)); 49 U.S.C. 21104(d) (Sec. 21104(d)). This requirement also applies to the interim releases of train employees. In addition, when a train

<sup>14</sup> 74 FR 30665, 30674 (June 26, 2009).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 74 FR 30665, 30675 (June 26, 2009).

employee's statutory minimum off-duty period is longer than 10 hours as a result of time on duty and limbo time in excess of 12 hours, the additional time off duty is also subject to the prohibition.

1. Does the prohibition protect employees from any communication for the entirety of the off-duty period?

A number of comments express concern that, despite the new requirement that the statutory minimum off-duty periods for train employees and signal employees, and any period of interim release for train employees, must be free from communication likely to disturb rest, railroads may persist in repeatedly contacting the employee and disrupting the employee's rest.

The statute establishes that time off duty only qualifies as a statutory minimum off-duty period or period of interim release when the required minimum time is undisturbed. Because the statute does not require the statutory minimum off-duty period or interim release to be so designated in advance, the result is that an employee needs only 10 hours or more of time off duty and undisturbed by railroad communications at any point in the 24 hours prior to reporting for duty in order to be in compliance with the hours of service laws. Accordingly, a railroad may communicate with the employee at times between the end of the statutory minimum off-duty period and the initiation of the employee's on-duty period without violating the hours of service laws. FRA is aware that such practices may contribute to employee fatigue, and expects railroads to exercise discretion when contacting employees in this intermediate period. The RSIA provided FRA with limited regulatory authority, which FRA may consider exercising if substantial scientific evidence demonstrates that such communication is posing an unacceptable risk to railroad safety from employee fatigue.<sup>18</sup>

2. Is it a violation for a railroad to intentionally call an employee to delay that employee's ability to report for duty?

No, provided that the employee at some point has at least a statutory minimum off-duty period that is free from communication, before being required to report for duty. So long as an employee receives a statutory minimum off-duty period in the 24 hours prior to reporting for duty,

communications outside of that period do not violate the prohibition on communication. Accordingly, it is not a violation for a railroad to contact an employee during other periods, as discussed above. The BLET and UTU joint comment argues that intentionally calling an employee in order to disrupt his or her off-duty period and require a new period to start violates Sec. 21103(e). As discussed above, only the statutory minimum off-duty period and periods of interim release for train employees are required to be uninterrupted by communications likely to disturb rest. Because the statutory minimum off-duty period does not need to be designated as such, the hours of service laws are not violated by these types of calls. For example, if an employee is called 8 hours after being released from duty, the statute will not be violated, but the employee must be provided 10 or more hours off duty (depending on the minimum statutory off duty period required for the employee) without such communication, beginning at the time the contact ended, to successfully complete a statutory off duty period and prevent any future activity for the railroad from commingling with the previous duty tour. If situations arise in which employees believe that a railroad is intentionally contacting an employee so that the employee's rest will have to be restarted (which restart delays the employee's eligibility to report for duty, increases the required off-duty period, and decreases the employee's income), such issues are a matter to be resolved between railroads and their employees through other mechanisms. So long as the rest period is restarted and the employee has 10 hours of uninterrupted rest before being called to report for duty, there is no violation of the statute.

3. For what purposes may an employee contact a railroad during the uninterrupted rest period?

In the Interim Interpretations, FRA stated that employees may choose to contact the railroad during the uninterrupted rest period, but that the railroad may only respond to the issues raised by the employee. However, FRA also flatly stated that railroads may not contact employees to delay an employee's assignment, with no reference to the preceding exception.<sup>19</sup> In their joint comment, BLET and UTU ask FRA to resolve the apparent contradiction between these two interpretations.

FRA recognizes that the prohibition extends to communication by the

railroad, not to communication by the employee. Therefore, FRA concludes that an employee may contact a railroad about any issue, including issues related to establishing or delaying a time for the employee to report, without the communication from the employee interrupting the rest period. In addition, a railroad may return the employee's call, if requested to do so by the employee, for the employee's convenience and to prevent the employee having to make repeated phone calls; these calls also do not interrupt the employee's rest period. However, any return phone call made by the railroad must be limited to the terms established by the employee. For example, an employee may indicate when he or she wishes to be called back (such as, within the next hour, or, in 6 hours, if the employee were planning to go to sleep and preferred to have the return call after waking up). Further, absent an emergency, the return call must be limited to the subject of the employee's call. For example, if an employee calls during the statutory minimum off-duty period to schedule a vacation day, the railroad returns that call, and the railroad raises an issue not discussed by the employee, such as establishing a report for duty time, the employee's rest period has been interrupted, and the employee must have a new statutory minimum off-duty period in order to separate any subsequent service from the prior duty tour.

Additionally, the time spent in calls that do not interrupt the off-duty period as described above will not be time off duty and may commingle with a prior or subsequent duty tour if the content of the call is service for the railroad carrier. For instance, a call from an employee discussing the circumstances of the on-duty injury of one of his or her crewmembers is considered service for the railroad carrier, and therefore is service that is not time off duty and may commingle with a prior or subsequent duty tour. See Federal Railroad Administration, Hours of Service Interpretations, Operating Practices Technical Bulletin OP-04-29 (Feb. 3, 2004). To avoid having the time spent on the call commingling and therefore becoming time on duty, the employee must have a statutory minimum off-duty period between the call and any time on duty.

FRA has historically recognized that some types of communication between a railroad and an employee are "at the behest of the railroad" and are therefore properly considered to be service for the carrier that is not time off duty. In recognition of the realities of railroad

<sup>18</sup> As will be discussed below, a railroad may contact an employee in certain limited circumstances even during the portion of an off-duty period that is required to be undisturbed.

<sup>19</sup> 74 FR 30665, 30672 (June 26, 2009).

operations and the desirability of maximizing the employee's ability to know his or her next reporting time and therefore that employee's ability to plan his or her rest during the off-duty period, FRA has also provided an exception from this general rule for calls to establish or delay an employee's time to report. In enforcing the new prohibition on communication by the railroad with train employees and signal employees during certain of their off-duty periods, FRA will continue to abide by this longstanding interpretation, if the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. While the establishment of a time to report for duty is service, FRA will extend its prior interpretation so that such communications are permitted and do not interrupt an off-duty period when the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. As a result, employees may call a railroad during their statutory minimum off-duty period to establish or delay a time to report, and railroads may return these calls, if an employee requests a return call and the return call is limited to any terms established by the employee as to the time and the content of the call, and that contact will not be considered to have interrupted the rest period or to require that it be restarted, provided that the time at which the employee is required to report is after the required period of uninterrupted rest.

This interpretation, which FRA has articulated in part and communicated in correspondence already, allows employees to have greater predictability as to when they will go to work, and a greater opportunity to plan their off-duty time to obtain adequate rest and handle other personal tasks and activities. Employees are able to take assignments when their statutory minimum off-duty period will have been completed at or prior to the report time, even if they would not have been fully rested at the time of the call to report. Conversely, in some cases, employees may be able to schedule themselves for an assignment that will allow them some additional time off duty to obtain additional rest or attend to personal activities. However, this interpretation should not be read as allowing any railroad to adopt a policy that requires employees to call the

railroad, or requires employees to grant the railroad permission to call the employee during the statutory off-duty period. Employees who do not call the railroad, and do not choose to receive communication from the railroad, during the period of uninterrupted rest, must not be called by the railroad to establish a report time until after 10 hours of uninterrupted rest, and the employee must not be disciplined or otherwise penalized for that decision.

FRA is aware that, having provided employees with an avenue for receiving information relating to their time to report during their statutory minimum off-duty period, there may be instances where a railroad, or an individual railroad manager, may seek to require that the employee contact the railroad during his or her statutory off-duty period to obtain the employee's next assignment. In circumstances where a railroad discriminates against an employee for refusing to violate a railroad safety law by failing to report after a disruption of rest caused the employee to not have a statutory minimum off-duty period, that action could constitute a violation of 49 U.S.C. 20109, enforced by the U.S. Department of Labor. Where credible evidence indicates that a railroad disrupted an employee's statutory minimum off-duty period without the employee having initiated the communication and requested a return call and yet allowed the employee to report, without restarting the rest period and providing the required uninterrupted rest, FRA will consider appropriate enforcement action. FRA expects that railroads will not attempt to coerce employees into authorizing communications that disrupted an employee's rest. Where evidence shows that a railroad made prohibited communications to an employee, because the employee did not initiate the communication, FRA may consider appropriate enforcement action under 49 U.S.C. 21103 and 21104. Employees must report unauthorized communications as an activity on their hours of service record for the duty tour following the communication. 49 CFR 228.11(b)(9).

4. May the railroad return an employee's communication during the rest period without violating the prohibition on communication?

As discussed above in section IV.C.3, the railroad may return an employee's communication during the rest period without violating the prohibition on communication, so long as the return communication is authorized by the employee and on the same topic as the employee's communication.

5. May the railroad call to alert an employee to a delay (set back) or displacement?

As discussed above in section IV.C.3, the railroad may only communicate with an employee if it is in reply to a communication from the employee, is authorized by the employee, and is on the same topic as the employee's communication. Accordingly, the railroad may only call to alert an employee to a delay (set back) or displacement if the employee previously communicated with the railroad on that issue during the rest period and authorized a return communication.

6. May an employee provide advance permission for railroad communications?

The BLET and UTU joint comment, as well as an individual commenter, ask if FRA will permit an employee to preemptively grant his or her employing railroad the authorization to contact the employee on certain matters. As was discussed in the previous response, employees may contact a railroad for any purpose, including establishing a time to report, and the railroad may return a call initiated by the employee, if the employee requests a return call, subject to the conditions discussed above. Because communication by the railroad is only allowed in response to specific communication initiated by the employee, an employee may not consent in advance to communication from the railroad.

It is important to note, however, that if a railroad communicates with an employee when not requested to do so by the employee, or discusses with the employee matters beyond the subject of the employee's initial call, the employee's rest period has been disturbed, but it is not necessarily a violation of the statute. If an unauthorized communication is made, railroads have the option of providing a new statutory minimum off-duty period to avoid violating the statute.

Additionally, railroads are not required under the statute to communicate with their employees during the period of uninterrupted rest. If a railroad concludes that it is too burdensome to determine in each instance the specific times within which an employee has requested a return call, and any limitations on the subject matter of the call, that railroad may decide simply not to contact any train employees or signal employees during their statutory minimum off-duty periods or periods of interim release.

7. Does the prohibition on communication apply to the extended rest required after 6 or more consecutive days initiating an on-duty period?

No. The statute is clear that the prohibition applies only to the statutory minimum off-duty period for signal employees and train employees as well as to interim releases and additional time off duty required by subsection (c)(4) for train employees. While one commenter requests that FRA extend the prohibition to the extended rest required by Sec. 21103(a)(4), FRA is unable to do so through the interpretation of the statute, because the statutory language itself specifically identifies those periods of rest when the railroad must not communicate with an employee in a way that could reasonably be expected to disrupt the employee's rest, and the 48- and 72-hour extended-rest periods are not included within the prohibition.

8. Does the prohibition on communication apply differently to forms of communication other than phone calls?

No. The prohibition on communication applies equally to any form of communication, including but not limited to phone calls, emails, text messages, voicemail, leaving a message at a hotel, or messages placed under the door of a hotel room by hotel staff.

9. May the railroad provide information that can be accessed at the employee's option?

Yes. FRA encourages provision of information that can be accessed at the employee's option, especially in the case of unscheduled or uncertain assignments, so that the employee can plan rest.

Because the alerts provided by most devices when an email or text message is received might reasonably be expected to disturb an employee who may be trying to obtain rest, such communications are generally prohibited communications. However, where the device in question is railroad-provided, such that it is only used for railroad business, employees have the option of turning the device off without impeding their ability to receive personal messages that they would want to receive even during rest. Therefore, the provision of information by text message or email to such a device is not a prohibited communication. Likewise, a railroad-provided Web site that the employee may voluntarily access could provide similar information. However, the employee may not be required to receive any communication of any sort,

to access information of any kind, or to respond in any way to the information provided.

*D. Questions Regarding the 276-Hour Monthly Limit on Service for the Railroad by Train Employees*

BLET and UTU request clarification on the 276-hour limit on time spent on duty, waiting for or in deadhead transportation to the place of final release, or in any other mandatory service for the railroad during a calendar month. The comment notes FRA's discussion of the issue in Section IV.C.6 of the Interim Interpretations, in which FRA stated that completing hazardous materials records is a task that falls within the category of "other mandatory service for the carrier[.]"<sup>20</sup> The unions request clarification that all Federal recordkeeping requirements are considered "other mandatory service" and, therefore, will be counted towards an employee's 276-hour limitation for each month. FRA confirms that if an employee has the duty to carry out a Federal recordkeeping requirement applicable to a railroad, action by the employee to carry out the requirement is to be considered "other mandatory service" and, therefore, will be counted towards the employee's 276-hour limitation for each month. In the Interim Interpretations, FRA provided the act of completing a record on the transfer of hazardous material, as required by Transportation Security Administration regulations, as one example of "other mandatory service for a railroad carrier[.]" This example is simply illustrative of the sort of activities that are included as "other mandatory service," and not an exception from FRA's general interpretation.

The BLET and UTU joint comment then asks if attendance at a rules class can avoid being considered as other mandatory service for the carrier if the employee is given the discretion on when to schedule and complete the training and the railroad simply provides a deadline date for completion of the training. FRA confirms that this arrangement is consistent with FRA's position taken in the Interim Interpretations, and remains FRA's interpretation: if an employee has the opportunity to schedule such training at a time that is convenient for him or her, then the time spent training in these circumstances would not be counted for the purposes of the 276-hour limitation.<sup>21</sup> Although training under the given circumstances can be excluded from the 276-hour monthly

limitation, it is nonetheless service for the railroad carrier and can commingle with covered service. As such, an employee must communicate the beginning and ending times of such activities with the railroad, and if a statutory off duty period does not exist between the activity and covered service the time spent in these activities will commingle becoming time on duty which will be included in the 276-hour monthly limitation.

Another commenter, AAR, seeks clarification with respect to an employee's responsibility to comply with the 276-hour monthly limitation, and asks that FRA consider an employee to have "deliberately misrepresented his or her availability" when "accepting a full-duty tour after completing an hours of service record for a prior duty tour showing that the employee does not have sufficient hours for another full duty tour." FRA declines to do so. As was discussed in Section IV.B.10, above, in response to AAR's similar comment regarding the "consecutive-days" limitations, given that FRA's enforcement policy with regard to its hours of service recordkeeping regulation allows railroads to keep "consecutive-days" limitation and monthly-service and limbo-time limitation data in a separate administrative ledger, rather than tracking the data daily on the record for each individual duty tour, railroads are in the best position to know whether or not an employee may report to perform service for the railroad. Additionally, while the penalty provision of the hours of service laws provides for individual liability for violation of the hours of service laws, the substantive restrictions operate on "a railroad carrier and its officers and agents." Employees have the obligation to provide accurate information to railroads regarding their service, and FRA will consider action as appropriate under the agency's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, 49 CFR part 209, appendix A, when employees fail to meet this obligation. However, simply reporting to perform service for the railroad is insufficient to demonstrate that an employee "deliberately misrepresented his or her availability."

One individual commenter asks if an individual who works for multiple railroads will be required to total all service for all of these railroads to calculate whether that individual has reached the 276-hour limitation. Because the hours of service laws do not restrict an employee's choice, of his or her own volition, to perform covered service for multiple railroad carriers

<sup>20</sup> 74 FR 30665, 30676 (June 26, 2009).

<sup>21</sup> See 74 FR 30665, 30675 (June 26, 2009).

(with the exception of Sec. 21103(a)(4), as discussed above in the interpretations governing that provision), the 276-hour limitation applies only to the employee's service for each railroad. Such an employee would not need to total all service for all of these railroads, but instead would be subject to a separate 276-hour limitation for each railroad for which he or she performs covered service as a train employee. However, as discussed in Section IV.B.7 above, for the purposes of compliance with Sec. 21103(a)(4), employees are responsible for reporting all service for any railroad carrier to each of their railroad carrier employers. While FRA has previously acknowledged its lack of authority to regulate employees who choose to be employed by multiple railroads, except with regard to Sec. 21103(a)(4), FRA notes that an employee working for multiple railroads may nonetheless be subject to an excessive risk of human factors accidents caused by fatigue. Further, FRA does have the authority to pursue individual liability enforcement action against individuals who willfully fail to report all service for any railroad carrier or individuals who perform service for any railroad carrier during the extended rest required by Sec. 21103(a)(4).

#### E. Additional Issues Raised by Commenters

##### 1. Statutory Changes

A large number of individual commenters wrote to express displeasure with the RSIA and its changes to the previous hours of service requirements. While FRA was granted some limited regulatory authority to address hours of service issues, any possible future FRA regulations, that might adjust the existing limitations or otherwise alter the application of the new laws, are outside the scope of these final interpretations of the existing statute.

##### 2. Waivers

Several commenters seek waivers of the mandatory rest requirement in Sec. 21103(a)(4) for specific subsets of the rail industry. Whatever the merits of these waiver requests, they are beyond the scope of this notice. Petitions for the waivers provided for in Sec. 21103(a)(4), like petitions for waiver of FRA's safety regulations, are handled by FRA's Railroad Safety Board. 49 U.S.C. 20103(d); 49 CFR 211.41.

##### 3. Definition of "Covered Service"

The BLET and UTU joint comment requests FRA consider all "yardmaster and similar positions" covered service.

"Covered service" refers to the functions performed by train employees, signal employees, and dispatching service employees. See 49 U.S.C. 21101, which defines these functions, and 49 CFR part 228, appendix A, which defines covered service in reference to these functions. Regardless of job title, an individual only performs covered service to the extent that the individual performs a function within one of the three statutory definitions. Therefore, FRA may not mandate that service outside of those three functions is covered service, or that employees with a certain job title will automatically be considered to have performed covered service.

The BRS comment requests clarification on what constitutes covered service for a signal employee. The comment suggests that FRA has been interpreting the statute to apply only to signal employees who work with "energized conductors." However, this understanding is incorrect. While a prior technical bulletin (Federal Railroad Administration, The Federal Hours of Service Law and Signal Service, Technical Bulletin G-00-02 (2000)) did refer to "energized conductors," it did so in the context of demonstrating types of activities that are and are not covered service, comparing work on those conductors to work laying cable on a new system. The sentence in the bulletin was not exclusive, and does not indicate an interpretation by FRA that a signal system must be "energized" in order for work installing, repairing, or maintaining that system to be considered covered service.

One individual commenter asks whether "mechanical employees" are subject to the hours of service requirements. While the statute changed the definition of "signal employee" to include those who are not employees of a railroad carrier, it did not alter the scope of what constitutes covered service that would subject an individual to the limitations within the statute. Accordingly, if service was considered covered service prior to the passage of the RSIA, that service remains covered service under the new statute. Additionally, some employees previously not subject to the hours of service laws that perform functions considered to be signal covered service but are not employed by a railroad carrier will now be covered by the hours of service laws. Employees who are generally considered to be "mechanical employees" may perform covered service within any of the three functional definitions, depending on the functions that the employee actually

performs. For example, a mechanical employee who performs the functions of a hostler is subject to the hours of service limitations for train employees in 49 U.S.C. 21103, while a mechanical employee who performs cab signal tests is subject to the hours of service limitations for signal employees in 49 U.S.C. 21104 (Sec. 21104).

##### 4. Exclusivity of Signal Service Hours of Service

The BRS expresses concern that, in categorically exempting signal employees from any hours of service rules promulgated by any Federal authority other than FRA, Congress created a "loophole" allowing a vehicle requiring a commercial driver's license to be driven by a "signal employee" who does not perform any covered service, with the result that such an employee is not covered by any hours of service limitations. The comment correctly notes that Congress did not intend to remove such individuals entirely from non-FRA Federal hours of service restrictions.

The solution is found within the statutory text at Sec. 21104(e), which states that "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." (Emphasis added.) The subsection headed "Exclusivity" applies only to *signal employees*, and signal employees are subject to the restrictions on hours of service provided in Sec. 21104(a). Therefore, the statute does not allow an individual subject to the exemption granted at Sec. 21104(e) not to be subject to Sec. 21104(a). FRA recognizes that this application may result in some difficulty for an employee who generally works as a signal employee ("installing, repairing, or maintaining signal systems") but happens in a particular duty tour only to drive a vehicle requiring a commercial driver's license, without performing any functions within the definition of a "signal employee" in that duty tour, because such an employee remains subject to Federal Motor Carrier Safety Administration (FMCSA) limitations and recordkeeping requirements. Sec. 21104(a). FRA is open to working with FMCSA in the future to limit or eliminate this overlap, but such efforts are outside the scope of this interpretation of the statute.

##### 5. Commuting Time

The BLET and UTU joint comment requests clarification of how FRA's prior

treatment of time spent commuting will continue in light of changes to the statute. FRA allows a 30-minute period for commuting at the away-from-home terminal, from an employee's point of final release to railroad-provided lodging, that will not be considered a deadhead, but rather, commuting time that is part of the statutory off-duty period, provided that the travel time is 30 minutes or less, including any time the employee spends waiting for transportation at the point of release or for a room upon arrival at the lodging location. See Federal Railroad Administration, Hours of Service Interpretations, Operating Practice Technical Bulletin OP-04-03 (Feb. 3, 2004). The hypothetical situation presented in the comment involves a train employee, finally released at the away-from-home terminal, being instructed to report 10 hours after the time of final release with no further communication from the railroad. In the hypothetical, the travel time to the railroad-provided lodging is less than 30 minutes, and the room for the employee is ready at the time the employee arrives. FRA sees no reason to depart from the prior interpretation of this situation. Accordingly, travel time of 30 minutes or less to railroad-provided lodging will be considered commuting, not deadheading, and therefore the employee's final release time will be established before the employee is transported to lodging. Similarly, in this hypothetical, an employee may depart for his or her reporting point in order to arrive at the reporting point 10 hours after his or her final release, so long as the travel time from the place of railroad-provided lodging to the reporting point is 30 minutes or less and so long as there is no additional communication from the railroad which interrupts the employee's off-duty period. Commuting time is considered part of the statutory off-duty period.

#### 6. Application of Exception to Limitation on Certain Limbo Time

The RSIA's amendments to Sec. 21103 added a limitation, effective October 16, 2009, of 30 hours per calendar month, on the amount of time each employee may spend in a particular category of limbo time—that is, time that is neither on-duty nor off-duty; namely, when the total of time on duty time and time spent either waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release exceeds 12 consecutive hours. 49 U.S.C. 21103(c)(1)(B). However, the amendments also include an exception from the limitation at Sec. 21103(c)(2),

which excludes delays caused by casualty, accident, act of God, derailment, major equipment failure preventing the train from advancing, or other delays caused by a source unknown and unforeseeable to the railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

In their joint comment, BLET and UTU request clarification on whether this exception also applies to Sec. 21103(c)(4), which requires additional rest for train employees if time spent on duty, waiting for deadhead transportation to a point of final release, and in deadhead transportation to a point of final release exceeds 12 hours. By the express language of the statute, the exception does not apply to Sec. 21103(c)(4). The language introducing the exception expressly states that it applies to “paragraph (1)” (i.e., Sec. 21103(c)(1)) and therefore presumably does not apply to paragraph (4) (i.e., Sec. 21103(c)(4)); had Congress wished for the exception to apply to paragraph (4), it would have written the law accordingly.

#### V. Portions of FRA's Interim Interpretations of the Hours of Service Laws on Which Comments Were Not Received and Which Are Incorporated in This Final Interpretation Essentially Without Change <sup>22</sup>

Several of FRA's Interim Interpretations received no comments and are not being revised in these final interpretations. Therefore, they are still applicable as previously published. These policies and interpretations are reprinted below for convenience. Those interim interpretations which are no longer effective as a result of these final interpretations have been replaced in this section with a reference to the section in this document where the relevant final interpretation is discussed. In some cases, the discussion of these policies and interpretations has been revised to reflect other changes in FRA's policies and interpretations discussed in this document, or in light of FRA's subsequent promulgation of its regulations governing the hours of service for employees providing intercity or commuter passenger rail

<sup>22</sup> For the present iteration, FRA made a few minor changes to the text that appeared in the Interim Interpretations. For example, FRA deleted material that had become obsolete, e.g., references to the 40-hour per month limit on certain limbo time since that limit expired on October 15, 2009. In addition, it was necessary to add language in parentheses to reflect that a reference to sections “above” meant sections of the Interim Interpretations. Further, FRA sometimes added a short “yes” or “no” answer before the previously published longer answer.

transportation. More information relating to the justification for these policies may be found in FRA's Interim Interpretations. 74 FR 30665 (June 26, 2009).

#### A. Questions Related to the Prohibition on Communication by the Railroad With Train Employees and Signal Employees

1. Does the prohibition on communication with train employees and signal employees apply to every statutory off-duty period no matter how long the employee worked?

Yes, except for the 48- or 72-hour rest requirement. This prohibition on communication applies to every off-duty period of at least 10 hours under Sec. 21103(a)(3) or 21104(a)(2) and to any additional rest required for a train employee when the sum of on-duty time and limbo time exceeds 12 hours under Sec. 21103(c)(4). For train employees, it also applies to every lesser off-duty period that qualifies as an interim release.

2. Is the additional rest for a train employee when on-duty time plus limbo time exceeds 12 hours mandatory, or may the employee decline it?

The additional rest is mandatory and may not be declined.

3. If an employee is called to report for duty after having 10 hours of uninterrupted time off duty, but then receives a call canceling the call to report before he or she leaves the place of rest, is a new period of 10 uninterrupted hours off duty required?

If the employee has not left the place of rest, the employee has not accrued on-duty time and would still be off duty, with the exception that the time spent in multiple calls could in certain circumstances commingle with a future duty tour.

4. What if the call is cancelled just one minute before report-for-duty time?

Although the employee will almost certainly have left the place of rest, the result to this scenario is the same as the result in the preceding question, in that the employee will not have accrued any time on duty.

5. What if the employee was told before going off duty to report at the end of required rest (either 10 hours or 48 or 72 hours after working 6 or 7 days), and is released from that call prior to the report-for-duty time?

The answer to this scenario is the same as the answer to the two preceding questions.

6. Are text messages or email permitted during the rest period?

(This question is answered in section IV.C.7 and IV.C.8 above.)

7. May the railroad return an employee's call during the rest period without violating the prohibition on communication?

(This question is answered in section IV.C.4 above.)

8. May the railroad call to alert an employee to a delay (set back) or displacement?

(This question is answered in section IV.C.5 above.)

9. If the railroad violates the requirement of undisturbed rest, is the undisturbed rest period restarted from the beginning?

Yes. (But see section IV.C.1, describing the time to which the prohibition on communication applies.)

10. Should any violation of undisturbed rest be documented by a record?

Yes. The communication and the time involved in it must be recorded as an activity on the employee's hours of service record, as required by 49 CFR 228.11(b)(9) for train employees and 49 CFR 228.11(e)(9) for signal employees.

(This question is discussed in more detail in section IV.C.1 and IV.C.2 above.)

11. Is the additional rest required when on-duty time plus limbo time exceeds 12 hours (during which communication with an employee is prohibited) to be measured only in whole hours, so that the additional rest requirement is not a factor until the total reaches 13 hours?

No. The additional undisturbed time off that an employee must receive includes any fraction of an hour that is in excess of 12 hours.

*B. Questions Related to the Requirements Applicable to Train Employees for 48 or 72 Hours Off at the Home Terminal*

1. Is a "Day" a calendar day or a 24-hour period for the purposes of this provision?

(This question is answered in section IV.B.1 above.)

2. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?

(This question is answered in section IV.B.5 above.)

3. Does deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day count as a day that triggers the 48-hour or 72-hour rest period requirement?

(This question is answered in section IV.B.2 and IV.B.3 above.)

4. Does attendance at a mandatory rules class or other mandatory activity that is not covered service but is non-covered service, count as initiating an on-duty period on a day?

No. As in the previous question, the rules class or other mandatory activity is other service for the carrier (non-covered service) that is not time on duty and would not constitute initiating an on-duty period if it is preceded and followed by a statutory off-duty period.

Likewise, if the rules class or other mandatory activity commingled with covered service during either the previous duty tour or the next duty tour after the rules class (because there was not a statutory off-duty period between them), the rules class or other mandatory activity would not itself constitute initiating a separate on-duty period, but would be part of the same on-duty period with which it is commingled.

This question is discussed in more detail in section IV.B.6 above.

5. If an employee is marked up (available for service) on an extra board for 6 days but only works 2 days out of the 6, is the 48-hour rest requirement triggered?

No. The employee must actually initiate an on-duty period. Being marked up does not accomplish this unless the employee actually reports for duty.

6. If an employee initiates an on-duty period on 6 consecutive days, ending at an away-from-home terminal and then has 28 hours off at an away-from-home terminal, may the employee work back to the home terminal? The statute says that after initiating an on-duty period on 6 consecutive days the employee may work back to the home terminal on the 7th day and then must get 72 hours off, but what if the employee had a day off at the away-from-home terminal after the 6th day?

The statute says that the employee may work on the 7th day if the sixth duty tour ends at the away-from-home terminal, but that the employee must then have 72 hours of time at the home terminal in which he or she is unavailable for any service for any railroad carrier. If the employee first has at least 24 hours off at the away-from-home terminal, the consecutiveness is

broken, and the employee has not initiated an on-duty period for 7 consecutive days and would not be entitled to 72 hours off duty after getting back to the home terminal. However, the time off at the away-from-home terminal would not count toward the 48 hours off duty that the employee must receive after getting back to the home terminal.

7. May an employee who works 6 consecutive days vacation relief at a "Temporary Home Terminal" work back to the regular home terminal on the 7th day?

Yes, the employee may initiate an on-duty period on the seventh day and then receive 72 hours off at the home terminal. FRA believes this is consistent with the statutory purpose of allowing the employee to have the extended rest period at home. To that end, although the statute refers to the home terminal, FRA expects that in areas in which large terminals include many different reporting points at which employees go on and off duty, the railroad would make every effort to return an employee to his or her regular reporting point, so that the rest period is spent at home.

*C. Questions Related to the 276-Hour Monthly Maximum for Train Employees of Time on Duty, Waiting for or Being in Deadhead Transportation to Final Release, and in Other Mandatory Service for the Carrier*

1. If an employee reaches or exceeds 276 hours for the calendar month during a trip that ends at the employee's away-from-home terminal, may the railroad deadhead the employee home during that month?

The literal language of the statute might seem to prohibit deadheading an employee who has already reached or exceeded the 276-hour monthly maximum, because time spent in deadhead transportation to final release is part of the time to be calculated toward the 276-hour maximum, and one of the activities not allowed after the employee reaches 276 hours. However, the intent of the statute seems to favor providing extended periods of rest at an employee's home terminal. Therefore, in most cases, FRA would allow the railroad to deadhead the employee home in this circumstance, rather than requiring the employee to remain at an away-from-home terminal until the end of the month.

FRA expects the railroad to make every effort to plan an employee's work so that this situation would not regularly arise, and FRA reserves the right to take enforcement action if a pattern of abuse is apparent.

2. How will FRA apply the 276-hour cap to employees who only occasionally perform covered service as a train employee, but whose hours, when combined with their regular shifts in non-covered service, would exceed 276 hours?

This provision in the RSIA does not specifically provide any flexibility for employees who only occasionally perform covered service as a train employee. Such employees would still be required, as they are now, to complete an hours of service record for every 24-hour period in which the employee performed covered service, and the employee's hours will continue to be limited as required by the statute for that 24-hour period. See 74 FR 25330, 25348 (May 27, 2009), 49 CFR 228.11(a).

FRA will likely exercise some discretion in enforcing the 276-hour monthly limitation with regard to employees whose primary job is not to perform covered service as a train employee, as most of the hours for such employees would be comprised of the hours spent in the employee's regular "non-covered service" position, which hours are not otherwise subject to the limitations of the statute. However, FRA will enforce the 276-hour limitation with regard to such employees if there is a perception that a railroad is abusing it.

3. Does the 276-hour count reset at midnight on the first day of a new month?

Yes. The statute refers to a calendar month, so when the month changes, the count resets immediately, as in the following example:

Employee goes on duty at 6 p.m. on the last day of the month, having previously accumulated 270 hours for that calendar month. By midnight, when the month changes, he has worked an additional 6 hours, for a total of 276 hours. The remaining hours of this duty tour occur in the new month and begin the count toward the 276-hour maximum for that month, so the railroad is not in violation for allowing the employee to continue to work.

4. May an employee accept a call to report for duty when he or she knows there are not enough hours remaining in the employee's 276-hour monthly limitation to complete the assignment or the duty tour, and it is not the last day of the month, so the entire duty tour will be counted toward the total for the current month?

It is the responsibility of the railroad to track an employee's hours toward the monthly limitation, so the employee is not the one in the best position to

determine whether he or she has sufficient time remaining in the monthly limitation to complete a duty tour for which he or she is called. Therefore, the employee would generally not be in trouble with FRA for accepting the call, absent evidence that the employee deliberately misrepresented his or her availability. The railroad will be in violation of the new hours of service laws if an employee's cumulative monthly total exceeds 276 hours. However, it could be a mitigating factor in some situations if the railroad reasonably believed the employee might be able to complete the assignment before reaching the 276-hour limitation.

- *Scenario 1:* Employee is called for duty with 275 hours already accumulated. It is only the 27th day of the month, so the entire period will be in the current month. It was probably not reasonable to assume that any assignment could be completed in the remaining time.
- *Scenario 2:* Again the 27th day of the month. This time the employee has only accumulated 264 hours toward the 276-hour monthly limitation. In this instance, the railroad may have expected that the employee could complete the covered service and deadhead to the home terminal within the remaining time. If that does not happen, the railroad is in violation, but enforcement discretion or mitigation of any penalties assessed will be considered if the railroad made a reasonable decision.

5. What activities constitute "Other Mandatory Service for the Carrier," which counts towards the 276-hour monthly limitation?

FRA recognizes that if every activity in which an employee participates as part of his or her position with the railroad is counted toward the 276-hour monthly maximum, it could significantly limit the ability of both the railroad to use the employee, and the employee to be available for assignments that he or she would wish to take, especially in the final days of a month. This has been raised as a matter of concern since enactment of the RSIA.

In particular, there are activities that may indirectly benefit a railroad but that are in the first instance necessary for an employee to maintain the status of prepared and qualified to do the work in question. In some cases these activities are compensated in some way, and in some cases not. These activities tend not to be weekly or monthly requirements, but rather activities that occur at longer intervals, such as audiograms, vision tests, optional rules refresher classes, and acquisition of security access cards for hazardous materials facilities. Most of these activities can be planned by employees

within broad windows to avoid conflicts with work assignments and maintain alertness. Railroads are most often not aware of when the employee will accomplish the activity.

Therefore, for the purposes of this provision, FRA will require that railroads and employees count toward the monthly maximum those activities that the railroad not only requires the employee to perform but also requires the employee to complete immediately or to report at an assigned time and place to complete, without any discretion in scheduling on the part of the employee.

Those activities over which the employee has some discretion and flexibility of scheduling would not be counted for the purposes of the 276-hour provision, because the employee would be able to schedule them when he or she is appropriately rested. FRA expects that railroads will work with their employees as necessary so that they can schedule such activities and still obtain adequate rest before their next assignment.

When any service for a railroad carrier is not separated from covered service by a statutory minimum off-duty period, the other service will commingle with the covered service, and therefore be included as time on duty. As time on duty, such time will count towards the monthly limit of 276 hours.

6. Does time spent documenting transfer of hazardous materials (Transportation Security Administration requirement) count against the 276-hour monthly maximum?

Yes. This example is a specific application of the previous question and response concerning "other mandatory service for the carrier." The activity of documenting the transfer of a hazardous material pursuant to a Transportation Security Administration requirement is mandatory service for the carrier, and a mandatory requirement of the position for employees whose jobs involve this function. Although the requirement is Federal, compliance with it is a normal part of an employee's duty tour, which must be completed as part of the duty tour, and the employee does not have discretion in when and where to complete this requirement. Time spent in fulfilling this requirement is part of the maximum allowed toward the 276-hour monthly maximum.

*D. Other Interpretive Questions Related to the RSIA Amendments to the Old Hours of Service Laws*

1. Does the 30-hour monthly maximum limitation on time awaiting and in deadhead transportation to final release only apply to time awaiting and in deadhead transportation after 12 consecutive hours on duty?

No. Sec. 21103(c)(1)(B) provides that “[a] railroad may not require or allow an employee \* \* \* to exceed 30 hours per month—(i) waiting for deadhead transportation; or (ii) in deadhead transportation from a duty assignment to a place of final release, following a period of 12 consecutive hours on duty \* \* \* .” The intent of this provision is to prevent situations in which employees are left waiting on trains for extended periods of time awaiting deadhead transportation, and then in the deadhead transportation. This purpose would be frustrated if none of the limbo time is counted toward the limitation unless the on-duty time for the duty tour is already at or exceeding 12 hours, as an employee who has accumulated 11 hours and 59 minutes in his or her duty tour could be subjected to limitless time awaiting and in deadhead transportation.

FRA will interpret this provision to include all time spent awaiting or in deadhead transportation to a place of final release that occurs more than 12 hours after the beginning of the duty tour, minus any time spent in statutory interim periods of release. For example, if an employee is on duty for 11 hours 30 minutes, and then spends an additional 3 hours awaiting and in deadhead transportation to the point of final release, for a total duty tour of 14 hours and 30 minutes, 2 hours and 30 minutes of the time spent awaiting or in deadhead transportation will be counted toward the 30-hour monthly limit.

2. Did the RSIA affect whether a railroad may obtain a waiver of the provisions of the new hours of service laws?

Yes, but FRA’s authority, delegated from the Secretary, to waive provisions of the hours of service laws as amended by the RSIA remains extremely limited. 49 CFR 1.49.

The RSIA left intact the longstanding, though limited, waiver authority at 49 U.S.C. 21102(b), which authorizes the exemption of railroads “having not more than 15 employees covered by” the hours of service laws “[a]fter a full hearing, for good cause shown, and on

deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.”

The RSIA amended the one other, even narrower waiver provision in the old hours of service laws and added three more equally narrow new waiver provisions. In particular, the RSIA revised 49 U.S.C. 21108, Pilot projects, originally enacted in 1994, involving joint petitions for waivers related to pilot projects under 49 U.S.C. 21108, primarily to provide for waivers of the hours of service laws both as in effect on the date of enactment of the RSIA and as in effect nine months after the date of enactment. Waivers under this section are intended to enable the establishment of one or more pilot projects to demonstrate the possible benefits of implementing alternatives to the strict application of the requirements of the hours of service laws, including requirements concerning maximum on-duty and minimum off-duty periods. The Secretary may, after notice and opportunity for comment, approve such waivers for a period not to exceed two years, if the Secretary determines that such a waiver is in the public interest and is consistent with railroad safety. Any such waiver, based on a new petition, may be extended for additional periods of up to two years, after notice and opportunity for comment. An explanation of any waiver granted under this section shall be published in the **Federal Register**.

The first of the three new waiver provisions, 49 U.S.C. 21109(e)(2), authorizes temporary waivers of that section in order “if necessary, to complete” a pilot project mandated by that subsection. To date, FRA has not conducted either of the specific pilot projects mandated by that section, because FRA has not received any waiver requests from a railroad, and its relevant labor organizations or affected employees, seeking to participate in these projects. FRA still seeks to complete these projects, if a railroad were willing to implement the necessary procedures, and the appropriate waiver could be designed.

The second new waiver provision, 49 U.S.C. 21103(a)(4), provides limited

authority to grant a waiver of one provision that it adds to the old hours of service laws. That provision is the requirement that an employee receive 48 hours off duty at the employee’s home terminal after initiating an on-duty period on 6 consecutive days, 72 hours off duty at the employee’s home terminal after initiating an on-duty period on 7 consecutive days, etc. This provision was discussed in section IV.B of the Interim Interpretations as well as section IV.B and V.B, above. FRA may waive this provision, and has done so in a number of instances in response to petitions received, if a collective bargaining agreement provides for a different arrangement and that arrangement is in the public interest and consistent with railroad safety. A railroad and its labor organization(s) or affected employees should jointly submit information regarding schedules allowed under their collective bargaining agreements that would not be permitted under this provision, and supporting evidence for the conclusion that it is in the interest of safety. Of course, a waiver is not needed for a schedule that would not violate this provision. For example, if a schedule provides that an employee works 4 consecutive days and then has one day off, the schedule would not violate the new hours of service laws, because the employee would not have initiated an on-duty period on 6 consecutive days, so 48 hours off duty would not be required.

The third and last new waiver provision authorizes waivers of the prohibition on communication during off-duty periods with respect to train employees of commuter or intercity passenger railroads if it is determined that a waiver will not reduce safety and is necessary to maintain such a railroad’s efficient operation and on-time performance. This waiver provision is no longer applicable, because such employees are now subject to FRA’s hours of service regulation for train employees providing commuter or intercity rail passenger transportation, and are therefore no longer subject to the statutory uninterrupted rest requirement. 49 CFR 228.413.

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**Joseph C. Szabo,**  
*Administrator.*

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