

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 01-1764, MM Docket No. 01-83, RM-10085]

**Digital Television Broadcast Service; Lexington, KY****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of WLEX Communications, LLC, licensee of station WLEX-TV, substitutes DTV channel 39 for DTV channel 22 at Lexington, Kentucky. See 66 FR 20620, April 24, 2001. DTV channel 39 can be allotted to Lexington in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (38-02-03 N. and 84-23-39 W.) with a power of 1000, HAAT of 288 meters and with a DTV service population of 814 thousand.

With this action, this proceeding is terminated.

**DATES:** Effective September 10, 2001.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Mass Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-83, adopted July 24, 2001, and released July 27, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

**List of Subjects in 47 CFR Part 73**

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—[AMENDED]**

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

**§ 73.622 [Amended]**

2. Section 73.622(b), the Table of Digital Television Allotments under Kentucky, is amended by removing DTV channel 22 and adding DTV channel 39 at Lexington.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Services Division, Mass Media Bureau.*

[FR Doc. 01-19146 Filed 7-31-01; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 232**

[FRA Docket No. PB-9; Notice No. 20]

RIN 2130-AB49

**Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices****AGENCY:** Federal Railroad Administration (FRA), DOT.**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** On January 17, 2001, FRA published a final rule revising the regulations governing braking systems and equipment used in freight and other non-passenger railroad train operations. The revisions were intended to achieve safety by better adapting the regulations to the needs of contemporary railroad operations and facilitating the use of advanced technologies. The revisions were issued in order to comply with Federal legislation, to respond to petitions for rulemaking, and to address areas of concern derived from experience in the application of existing standards governing these operations. In this document, FRA responds to the concerns and issues raised by interested parties related to the periodic maintenance and testing requirements contained in subpart D of the final rule. This document clarifies and amends the final rule, where necessary, in response to the petitions for reconsideration related to subpart D of the final rule. FRA intends to respond to petitions for reconsideration of other portions of the final rule in a separate document that will be published in the **Federal Register** in the near future.

**DATES:** The amendments to the final rule are effective August 1, 2001. The incorporation by reference of certain publications listed in the amendments to the final rule is approved by the Director of the Federal Register as of August 1, 2001.

**FOR FURTHER INFORMATION, CONTACT:** Leon Smith, Deputy Regional Administrator, Region 3, FRA Office of Safety, RRS-14, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590

(telephone 404-562-3800), or Thomas Herrmann, Trial Attorney, Office of the Chief Counsel, RCC-10, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202-493-6053).

**SUPPLEMENTARY INFORMATION:****Background**

On January 17, 2001, FRA issued a final rule revising the Federal safety standards governing braking systems and equipment used in freight and other non-passenger railroad train operations. See 66 FR 4104. The effective date of the final rule was May 31, 2001. See 66 FR 9906 (February 12, 2001) and 66 FR 29501 (May 31, 2001). In response to the final rule, FRA received six petitions for reconsideration from seven parties raising various issues related to a number of the provisions contained in the final rule. These petitioners included:

Association of American Railroads (AAR)

American Short Line and Regional Railroad Association (ASLRRA)

American Public Transportation Association (APTA),

Brotherhood of Locomotive Engineers (BLE),

New York Air Brake Corporation (NYAB),

Rail Passenger Car Alliance (RPCA), and

Union Pacific Railroad Company (UP).

The purpose of this document is to address the issues raised in the petitions for reconsideration relating to the periodic maintenance and testing requirements prescribed in subpart D of the final rule. FRA believes that it is necessary to address these issues as quickly as possible because the periodic maintenance and testing requirements prescribed in subpart D of the final rule have a compliance date of August 1, 2001. Thus, rather than delay the compliance date of the requirements prescribed by this subpart, FRA believes that the best course of action is a separate response addressing the issues specifically raised with regard to this subpart. Due to the complexity of some of the issues raised in the petitions for reconsideration on other provisions of the final rule, FRA intends to respond to those other issues in a separate notice that will be published in the **Federal Register** in the near future.

In response to the final rule, FRA received a joint petition for reconsideration from the AAR and the ASLRRA ("AAR petition") raising various issues relating to the periodic maintenance and testing provisions contained in subpart D of the final rule. The specific issues and

recommendations raised by these petitioners, and FRA's response to those issues and recommendations are discussed in detail in the "Section-by-Section Analysis" portion of the preamble. The section-by-section analysis also contains a detailed discussion of each provision of the January 17, 2001 final rule that is being clarified or amended. This will enable the regulated community to more readily compare this document with the preamble discussions contained in the final rule and will aid the regulated community in understanding the requirements of the rule. All of the changes being made to the final rule in this response to the specific petition for reconsideration noted above are intended to be clarifying or technical amendments or are otherwise within the scope of the issues and options discussed, considered, and raised in either the 1998 notice of proposed rulemaking (NPRM) or the final rule.

### Section-by-Section Analysis

#### *Subpart D—Periodic Maintenance and Testing Requirements*

##### Section 232.303 General requirements

Paragraph (a)(1)(iv) of this section is being slightly modified in response to AAR's petition for reconsideration seeking modification or clarification of the definition contained in this paragraph of what constitutes a "repair track" under subpart D. In the preamble to the final rule, FRA explained that the definition contained in this paragraph, when read in conjunction with the rest of the subpart, would require railroads to treat all cars on a track either designated, or regularly and consistently used as a place, to perform minor car repairs (sometimes referred to as an "expedite track" or "expediter track") to be treated as though they are on a repair track during the period in which major car repairs are being conducted on the track and therefore subject to certain tests and inspections. *See* 66 FR 4179. AAR recommends that single car or repair track air brake tests and other inspections should be required for a car on an expedite track only if the car is undergoing a major repair.

The purpose of this stringent requirement was to prevent railroads from avoiding periodic testing of the brake system by regularly performing major repairs on trackage designated or regularly used to conduct minor repairs. The purpose was not to alter the basic approach to capturing cars for testing at appropriate intervals. FRA also intended for this and other definitions in the final rule to be consistent with FRA's existing enforcement policies and

guidance. *See* 66 FR 4178. Prior to the issuance of the final rule, FRA issued Technical Bulletin (TB) MP&E 00-01 on January 12, 2000, containing enforcement guidance regarding what constitutes a repair or shop track. TBs are intended to provide FRA's inspection personnel as well as industry representatives guidance on how the regulations are to be interpreted and enforced. The definition of shop or repair track contained in the final rule codified much of the guidance contained in the above noted TB. However, TB MP&E 00-01 made clear that if major repairs are conducted on a track designated for minor repairs, then the car receiving the major repairs is to be treated as though it is on a shop or repair track. *See* TB MP&E 00-01 (last sentence, page 2). Accordingly, after reviewing AAR's petition and reexamining the final rule, FRA has determined that the requirement contained in this paragraph is overly stringent and inconsistent with FRA's intent when issuing the definitions of shop or repair track for purposes of this section.

In order to remain consistent with FRA's primary intent when issuing the requirements, FRA is granting the AAR's petition for reconsideration. FRA is modifying the definition contained in paragraph (a)(1)(iv) to make it consistent with enforcement guidance in effect prior to the issuance of the final rule regarding what constitutes a shop or repair track. Therefore, the amendment to paragraph (a)(1)(iv) clarifies that when major repairs are conducted on trackage that is designated or used by a railroad to regularly and consistently perform minor repairs that trackage will be considered to be a repair track only for the car or cars receiving the major repairs. FRA believes that this restriction is sufficiently stringent to ensure that railroads do not divert cars to "expediter" tracks to avoid conducting single car air brake tests. By eliminating any temporary advantage to avoidance of the requirement, this formulation will also tend to promote the completion of heavier repairs under conditions where appropriate arrangements are provided to reduce the risk of injury to workers.

On January 1, 2001, the AAR and its member railroads modified the industry standard related to the performance of both the single car and repair track air brake tests, consolidating the procedures for conducting the two brake tests into one testing procedure, which will be referred to as the "single car air brake test" in § 232.305 of this regulation. FRA accepts and incorporates these new procedures into

this rule in lieu of the previously incorporated procedures, as discussed in the section-by-section analysis of § 232.305 below. FRA also makes certain conforming changes to various provisions contained in § 232.303. Paragraphs (e), (e)(1), (e)(1)(iv), and (f) of this section are being amended to remove any reference to the previously incorporated repair track air brake test. Instead, these paragraphs will reference the new single car air brake test adopted by the industry on January 1, 2001.

#### Section § 232.305 Single Car Air Brake Tests

As noted above, FRA is modifying this entire section in order to incorporate the new AAR procedures for performing single car air brake tests that the industry adopted beginning on January 1, 2001. In its petition, the AAR noted that the April 1, 1999, procedures incorporated in §§ 232.305 and 232.307 of the final rule for performing single car and repair track air brake tests were revised only days before the publication of the final rule on January 17, 2001. The AAR procedures incorporated in the final rule were replaced with a new procedure which combined and enhanced the elements of the previous two air brake test procedures into one single car air brake test procedure, that would be performed whenever either of the two previous tests were required. FRA agrees that the revisions made to the procedures incorporated in the final rule result in a better test that will enhance the safety and reliability of the braking systems on freight equipment. Consequently, FRA is revising this section to incorporate the new AAR procedures, which have been in use by the industry since January 1, 2001.

FRA is also merging the requirements previously contained in §§ 232.305 and 232.307 of the final rule related to the frequency at which the single car and repair track air brake tests are to be performed. The new single car air brake test procedures are and will continue to be performed whenever any of the events occur that were previously detailed in §§ 232.305 and 232.307 of the final rule. FRA is merely merging the list of qualifying events from those two sections of the final rule into this section. The merging of these two sections does not change any of the qualifying events or frequencies which were previously contained in the final rule. Paragraph (f) of this section has been added in order to avoid any misunderstandings or misinterpretations. FRA intends for this paragraph to make clear that a single car or repair track air brake test performed pursuant the AAR procedures as they

existed prior to January 1, 2001, will be considered the last single car air brake test on that piece of equipment for purposes of the requirements prescribed by this section.

In its petition, the AAR again questions the need or wisdom of either FRA's incorporation of its existing single car air brake testing procedures or FRA's approval of any change in those procedures. The AAR points out that the fact that the AAR's April 1, 1999 testing procedures had already been revised by the time the final rule was issued is evidence that FRA will constantly be lagging behind the industry and will merely slow the industry's implementation of improvements to the air brake test requirements. The AAR further contends that the industry's demonstrated record of improving the standards related to periodic air brake testing requirements supports self-regulation in this area. The AAR also noted that it did not understand what FRA means when it states that FRA approval of any changes to the incorporated procedures is necessary to prevent unilateral changes from being made to the procedures.

While FRA agrees that the industry and AAR have improved and enhanced the periodic testing of the brake system through their implementation of various air brake testing requirements, FRA continues to believe that the single car air brake test is critical to ensuring the safe and proper operation of the brake equipment on the nation's fleet of freight cars. With the elimination of time-based cleaning, oiling, and testing of air brake systems, the single car air brake test has become the sole method by which air brake equipment on freight cars is periodically tested to identify potential problems before they result in the brake's becoming inoperative. Therefore, FRA continues to believe that specific and determinable limits must be placed on the manner and frequency of performing this test.

FRA also continues to believe that FRA as well as other interested parties must be given an opportunity to review and comment on any revision of the procedures by which these tests are performed to ensure that there is no degradation in safety resulting from any such modification and to ensure consistency in how the tests are performed. In the preamble to the final rule, FRA also noted that its review and approval are necessary to prevent unilateral changes from being made to the test procedures. Under the existing maintenance provisions prescribed in part 232, freight cars are subject to periodic brake attention in accordance with "the currently effective AAR Code

of Rules for cars in interchange" and "the currently effective AAR Code of Tests." See 49 CFR 232.17. The existing regulations permit the AAR to make unilateral changes to either its Code of Rules or its Code of Tests and, thus, to affect how or what periodic tests and maintenance may be required, potentially without FRA or any other non-AAR member having an opportunity to provide input. By incorporating the January 1, 2001 AAR procedures for conducting single car air brake tests into the regulations, FRA ensures that a minimum baseline standard is maintained and allows for FRA and other interested parties to review and comment on any potential change or deviation from that baseline standard.

FRA continues to recognize that the industry may find it necessary to modify the single car air brake test procedures from time to time in order to address new equipment or utilize new technology. Thus, FRA is amending paragraph (a) of this section and revising § 232.307 to include an expedited method by which the industry may revise the incorporated test procedures. In response to the AAR petition for reconsideration, FRA is adding another method by which the incorporated test procedures may be modified, in addition to the special approval process contained in § 232.17 of the final rule. As recommended by AAR in its petition, the modification procedure being added in this response will permit changes in the procedures to become immediately effective upon expiration of a comment period if no objections are raised to the proposed modification by either FRA or other interested parties during the comment period.

It should be noted that the incorporated procedures for performing single air brake tests are the minimum requirements for performing such tests. The special approval or modification process is required to be used only if the incorporated procedures are to be changed in some manner. For instance, if the industry were to elect to add a new test protocol to its procedures, there would be no need to seek approval of such an addition as long as the procedures contained in the incorporated standard are still maintained. The final rule is not intended to prevent railroads from voluntarily adopting additional or more stringent maintenance standards provided they are consistent with the standards incorporated.

#### Section § 232.307 Modification of the Single Car Air Brake Test Procedures

The AAR's petition for reconsideration requests that FRA withdraw the requirement that FRA approve AAR single car air brake testing requirements or, alternatively, that FRA permit changes in the procedures to go into effect automatically unless FRA explicitly objects to the changes. As noted in the preceding discussion, FRA recognizes that the industry may find it necessary to modify the single car air brake test procedures from time to time. FRA also agrees that a process needs to be provided to the industry to allow for modification of the incorporated testing procedures in a quick and efficient manner. However, any such process must provide both FRA and other interested parties an opportunity to review potential changes prior to their becoming effective. Consequently, to meet these needs and to respond substantively to AAR's request, FRA has revised this section to include a process by which the incorporated single car air brake test procedures in § 232.305(a) can be modified expeditiously.

The process outlined in this section will permit the industry to modify the single car air brake test procedures incorporated in § 232.305, and permit those modifications to become effective 75 days from the date that FRA publishes the requested modification in the **Federal Register**, if no objection to the requested modification is raised either by FRA or any other interested party. The process allows FRA and other interested parties 60 days to review and raise objections to any proposed modification requested by the industry and submitted to FRA.

Paragraph (a) describes the information that must be submitted to FRA in a request for modification. Paragraph (b) requires FRA to publish a notice in the **Federal Register** upon receipt of any request for modification. FRA wishes to make clear that the publication of such a notice may occur several days or weeks after the submission of a request for modification due to formatting requirements and scheduling concerns of the **Federal Register** as well as FRA's workload capabilities. However, FRA is committed to ensuring that this expedited modification process is successful and will make every effort to publish requests for modification as quickly as possible without undue delay.

Paragraph (c) provides for a 60-day comment period, during which FRA and other interested parties will review the request. FRA must also raise any

objections it has to a requested modification during the 60-day comment period. Interested parties must submit any objections they have to the requested modification during the 60-day comment period provided.

Paragraph (d)(1) explains that a requested modification will become effective 15 days after the close of the 60-day comment period if FRA raises no objections to the requested modification and no objections are received by other interested parties. The 15-day waiting period is designed to afford FRA a chance to review any comments submitted during the 60-day comment period, especially those submitted toward the end of that period. Thus, the party requesting the modification may not be informed of an objecting comment until after the close of the 60-day comment period. However, such notification would be provided prior to the close of the 15-day waiting period.

Paragraph (d)(2) makes clear that if objections are raised to a requested modification by either FRA or another interested party during the prescribed time periods, then the request will be disposed of in a manner similar to that established for addressing petitions for an alternative standard under the special approval procedures contained in § 232.17 of the final rule. FRA will either grant or deny the requested modification in as expeditious manner as possible, generally within 90 days of receiving the submission. Accordingly, when an objection is raised to a requested modification, the proposed modification could not become effective until FRA formally grants the request.

FRA believes the process established in this section will meet the needs of AAR and the industry to modify the single car air brake test procedures incorporated in § 232.305(a) expeditiously. However, for the process to work at optimum efficiency, the AAR and the industry would be best served if they ensure that there is open communication regarding any modifications with both FRA and the representatives of affected employees prior to requesting any modification of the procedures. This will ensure that interested parties are fully informed of any potential modification and their concerns are addressed or allayed before a request for modification is submitted to FRA. This information and dialogue will eliminate the potential for objections being submitted when the requested modification is officially sought.

#### Section § 232.309 Equipment and Devices Used To Perform Single Car Air Brake Tests

Due to the AAR's consolidation of the procedures for performing single car and repair track air brake tests into a single procedure and FRA's acceptance and incorporation of those new procedures into the rule, as discussed in detail above, conforming changes are being made to paragraph (a) of this section. Paragraph (a) is amended to remove any reference to the previously incorporated repair track air brake test. Instead, this paragraph will reference the new single car air brake test adopted and implemented by the industry on January 1, 2001.

#### Appendix A To Part 232—Schedule of Civil Penalties

Appendix A to this part contains the schedule of civil penalties to be used in connection with this part. Due to the modification of the final rule discussed in detail above, FRA is making conforming changes to the schedule of civil penalties contained in this appendix.

#### Regulatory Impact

##### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This response to petitions for reconsideration of the final rule has been evaluated in accordance with Executive Order 12866 and DOT policies and procedures. Although the final rule met the criteria for being considered a significant rule under those policies and procedures, the amendments contained in this response to petitions for reconsideration of the final rule are not considered significant because they either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule. The economic impact of the amendments and clarifications contained in this response to petitions for reconsideration will generally reduce the cost of compliance with the rule. However, the cost reduction will be minimal and does not significantly alter FRA's original analysis of the costs and benefits associated with the original final rule.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. FRA prepared and placed in the docket a Regulatory Flexibility Assessment, which assessed the small entity impact of the final rule. FRA certifies that this response to petitions for reconsideration of the final rule does

not affect the assessments made in that document. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590.

Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), FRA has published an interim policy that formally establishes "small entities" as being railroads that meet the line-haulage revenue requirements of a Class III railroad. 62 FR 43024 (Aug. 11, 1997). For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

FRA certifies that this response to petitions for reconsideration does not have a significant impact on a substantial number of small entities. Because the amendments contained in this document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small units of government, businesses, or other organizations.

##### *Paperwork Reduction Act*

This response to petitions for reconsideration of the final rule does not significantly change any of the information collection requirements contained in the original final rule. Presently, the information collection requirements associated with this rule have been approved by the Office of Management and Budget (OMB) under OMB Number 2130-0008. The current expiration date for this OMB approval is December 31, 2003.

After carefully reviewing the petitions for reconsideration of the final rule, FRA's response to the petitions contained in this document incorporates a new single car air brake test procedure in place of the single car and repair track air brake test procedures incorporated in the final rule at §§ 232.305 and 232.307. The newly incorporated single car air brake test procedures will be contained solely in § 232.305 with virtually the same triggering requirements as before. In this response, FRA will permit the AAR or other authorized representative of the rail industry to seek modification of the single car air brake test procedures pursuant to a new modification procedure which will be contained in

§ 232.307. Under the final rule, the only method by which a party could modify the incorporated testing procedures was to submit a petition under the special approval process contained in § 232.17. The modification procedures contained in this document will require much of the same information to be submitted by the requesting party as is required under § 232.17, but will permit modifications to become effective immediately if no objection is raised by either FRA or other interested parties. The burden associated with the new § 232.307 has already been accounted for under the estimated burdens associated with § 232.17 because most of the petitions that would have been submitted under the special approval process will likely be submitted under the modification procedures contained in § 232.307. Overall, the burden hours for this information collection have not changed; they have merely been reallocated. FRA has included the modification procedures in order to make the approval process for certain modifications more expeditious for the industry, which may ease some of the time and cost burdens incurred in complying with this regulation.

It should be noted that the AAR raised several issues concerning the information collection submission associated with this final rule and FRA's compliance with the Government Paperwork Elimination Act (GPEA). FRA intends to respond to these concerns as well as other substantive issues in a separate response that will be published in the **Federal Register** in the near future.

#### *Environmental Impact*

FRA has evaluated this response to petitions for reconsideration of the final rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this document is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c) of FRA's Procedures.

#### *Federalism Implications*

FRA believes it is in compliance with Executive Order 13132. Because the amendments contained in this response to petitions for reconsideration of the final rule either clarify requirements currently contained in the final rule or

allow for greater flexibility in complying with the rule, this document will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This response to petitions for reconsideration of the final rule will not have federalism implications that impose any direct compliance costs on State and local governments. FRA notes that States involved in the State Participation Program, pursuant to 49 CFR part 212, may incur minimal costs associated with the training of their inspectors involved in the enforcement of the final rule; however, the majority of technical training costs for inspectors are borne by FRA within existing appropriations.

In any event, Federal preemption of a State or local law occurs automatically as a result of the statutory provision contained at 49 U.S.C. 20106 when FRA issues a regulation covering the same subject matter as a State or local law unless the State or local law is designed to reduce an essentially local safety hazard, is not incompatible with Federal law, and does not place an unreasonable burden on interstate commerce. (See discussion in the section-by-section analysis of § 232.13.) It should be noted that the potential for preemption also exists under various other statutory and constitutional provisions. These include: 49 U.S.C. 20701–20703 (formerly, commonly known as the Locomotive Inspection Act), 49 U.S.C. 20301–20304 (formerly, commonly known as the Safety Appliance Acts), and the Commerce Clause of the United States Constitution.

#### *Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." See 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this response to petitions for

reconsideration of the final rule in accordance with Executive Order 13211. Although the final rule met the criteria for being considered a significant rule under Executive Order 12866 and DOT policies and procedures, the amendments contained in this response to petitions for reconsideration of the final rule are not considered significant because they either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

#### **List of Subjects in 49 CFR Part 232**

Incorporation by reference, Penalties, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

For the reasons set forth in the preamble, part 232 of chapter II of title 49 of the Code of Federal Regulations is amended as follows:

#### **PART 232—[AMENDED]**

1. The authority citation for part 232 continues to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 49 CFR 1.49 (c), (m).

#### **Subpart D—Periodic Maintenance and Testing Requirements**

2. Section 232.303 is amended by revising paragraphs (a)(1)(iv), (e)(1) introductory text and (e)(1)(iv), and the introductory text of paragraphs (e) and (f) to read as follows:

##### **§ 232.303 General requirements.**

(a) \* \* \*

(1) \* \* \*

(iv) A track designated by a railroad as a track where minor repairs will be conducted or used by a railroad to regularly and consistently perform minor repairs during the period when the track is used to conduct major repairs; however, such trackage is considered a shop or repair track only for each car receiving major repairs on such trackage and not for a car receiving only minor repairs; and

\* \* \* \* \*

(e) If the single car air brake test required by § 232.305 cannot be conducted at the point where repairs can be made to the car, the car may be moved after the repairs are made to the next forward location where the test can be performed. Inability to perform a single car air brake test does not constitute an inability to make the necessary repairs.

(1) If it is necessary to move a car from the location where the repairs are

performed in order to perform a single car air brake test required by this part, a tag or card shall be placed on both sides of the equipment, or an automated tracking system approved for use by FRA, shall contain the following information about the equipment:

\* \* \* \* \*

(iv) Indication whether the car requires a single car air brake test;

\* \* \* \* \*

(f) The location and date of the last single car air brake test required by § 232.305 shall be clearly stenciled, marked, or labeled in two-inch high letters or numerals on the side of the equipment. Alternatively, the railroad industry may use an electronic or automated tracking system to track the required information and the performance of the test required by § 232.305.

\* \* \* \* \*

3. Section 232.305 is revised to read as follows:

#### **§ 232.305 Single car air brake tests.**

(a) Single car air brake tests shall be performed by a qualified person in accordance with either Section 3.0, "Tests-Standard Freight Brake Equipment," and Section 4.0, "Special Tests," of the Association of American Railroads Standard S-486-01, "Code of Air Brake System Tests for Freight Equipment," contained in the AAR *Manual of Standards and Recommended Practices, Section E* (January 1, 2001); an alternative procedure approved by FRA pursuant to § 232.17; or a modified procedure approved in accordance with the provisions contained in § 232.307. The incorporation by reference of these two sections of this AAR standard was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated document from the Association of American Railroads, 50 F Street, NW., Washington, DC 20001. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1120 Vermont Avenue, NW., Suite 7000, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) Except as provided in § 232.303(e), a railroad shall perform a single car air brake test on a car when:

(1) A car has its brakes cut-out or inoperative when removed from a train or when placed on a shop or repair track, as defined in § 232.303(a);

(2) A car is on a shop or repair track, as defined in § 232.303(a), for any

reason and has not received a single car air brake test within the previous 12-month period;

(3) A car is found with missing or incomplete single car air brake test information;

(4) One or more of the following conventional air brake equipment items is removed, repaired, or replaced:

(i) Brake reservoir;

(ii) Control valve mounting gasket;

(iii) Pipe bracket stud;

(iv) Service portion;

(v) Emergency portion; or

(vi) Pipe bracket.

(5) A car is found with one or more of the following wheel defects:

(i) Built-up tread, unless known to be caused by hand brake left applied;

(ii) Slid flat wheel, unless known to be caused by hand brake left applied; or

(iii) Thermal cracks.

(c) Except as provided in paragraph (d) of this section, each car shall receive a single car air brake test no less than every 5 years.

(d) Each car shall receive a single car air brake test no less than 8 years from the date the car was built or rebuilt.

(e) A single car air brake test shall be performed on each new or rebuilt car prior to placing or using the car in revenue service.

(f) For purposes of paragraphs (b)(2), (b)(3), and (c) of this section, if a single car test or repair track air brake test is conducted on a car prior to January 1, 2001, pursuant to the then existing AAR standards, it shall be considered the last single car air brake test for that car, if necessary.

4. Section 232.307 is revised to read as follows:

#### **§ 232.307 Modification of the single car air brake test procedures.**

(a) *Request.* The AAR or other authorized representative of the railroad industry may seek modification of the single car air brake test procedures prescribed in § 232.305(a). The request for modification shall be submitted in triplicate to the Associate Administrator for Safety, Federal Railroad Administration, 400 7th Street, S.W., Washington, D.C. 20590 and shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the modification;

(2) The modification, in detail, to be substituted for a particular procedure prescribed in § 232.305(a);

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the modification will provide at least an equivalent level of safety; and

(4) A statement affirming that the railroad industry has served a copy of the request on the designated representatives of the employees responsible for the equipment's operation, inspection, testing, and maintenance under this part, together with a list of the names and addresses of the persons served.

(b) *Federal Register document.* Upon receipt of a request for modification, FRA will publish a document in the **Federal Register** containing the requested modification. The document will permit interested parties 60 days to comment on any requested modification.

(c) *FRA review.* During the 60 days provided for public comment, FRA will review the petition. If FRA objects to the requested modification, written notification will be provided, within this 60-day period, to the party requesting the modification detailing FRA's objection.

(d) *Disposition.* (1) If no comment objecting to the requested modification is received during the 60-day comment period, provided by paragraph (b) of this section, or if FRA does not issue a written objection to the requested modification, the modification will become effective 15 days after the close of the 60-day comment period.

(2) If an objection is raised by an interested party, during the 60-day comment period, or if FRA issues a written objection to the requested modification, the requested modification will be handled as follows:

(i) If FRA finds that the request complies with the requirements of this section and that the proposed modification is acceptable and justified, the request will be granted, normally within 90 days of its receipt. If the request for modification is neither granted nor denied within 90 days, the request remains pending for decision. FRA may attach special conditions to the approval of any request for modification. Following the approval of a request for modification, FRA may reopen consideration of the request for cause.

(ii) If FRA finds that the request does not comply with the requirements of this section and that the proposed modification is not acceptable or justified, the requested modification will be denied, normally within 90 days of its receipt.

(iii) When FRA grants or denies a request for modification, or reopens consideration of the request, written notice is sent to the requesting party and other interested parties.

5. Section 232.309 is amended by revising the section heading and paragraph (a) to read as follows:

**§ 232.309 Equipment and devices used to perform single car air brake tests.**

(a) Equipment and devices used to perform single car air brake tests shall be tested for correct operation at least once each calendar day of use.

\* \* \* \* \*

6. Appendix A to part 232 is amended by removing the entry for § 232.307 and by revising the entry for § 232.305 to read as follows:

**Appendix A to Part 232—Schedule of Civil Penalties**

\* \* \* \* \*

	Section	Willful Violation
* * *		
232.305 Single car air brake tests:		
(a) Failure to test in accord with required procedure .....	2,500	5,000

	Section	Willful Violation
(b)–(e) Failure to perform test .....	2,500	5,000
* * *		

\* \* \* \* \*

Issued in Washington, DC, on July 26, 2001.

**Betty Monro,**

*Deputy Federal Railroad Administrator.*

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