

VIA E-MAIL ONLY

April 16, 2020

Mr. Brian K. Saltz
Assistant Deputy General Counsel
Long Island Rail Road
bsaltz@lirr.org

**Re: Request for Relief in FRA Emergency Docket FRA-2020-0002 related to
COVID-19 Public Health Emergency**

Dear Mr. Saltz:

This letter is in reply to the March 19, 2020, petition from the Long Island Rail Road Company (LIRR) for emergency relief from certain Federal Railroad Administration (FRA) rail safety requirements (Petition). LIRR requested temporary emergency relief from several requirements of Title 49 of the Code of Federal Regulations (CFR) related to the training and qualification of railroad employees, accident reporting, efficiency testing, random alcohol and drug testing, hours of service limitations, signal and grade crossing warning system testing, occupational noise exposure, locomotive engineer and conductor certification requirements, system safety plans, equipment inspections, and certain reporting and notification requirements related to positive train control (PTC) system implementation.

As noted in your petition, on March 13, 2020, FRA Administrator Ronald L. Batory activated the emergency relief docket (ERD) in response to the coronavirus disease 2019 (COVID-19) public health emergency occurring throughout the United States. FRA considered LIRR's request under the provisions of 49 CFR § 211.45, *Petitions for Emergency Waiver of Safety Rules*. LIRR's petition is available for public review and comment in the ERD (Docket Number FRA-2020-0002, Document Number FRA-2020-0002-0011).

General Relief

FRA notes that the Association of American Railroads, the American Short Line and Regional Railroad Association, and the American Public Transportation Association (APTA) (together referred to as the "Associations") requested relief similar to many of LIRR's requests. By letters dated March 25, March 30, and April 6, 2020, FRA granted the Associations relief subject to certain conditions and limitations. Copies of FRA's letters are attached for your

reference and are available for review online at www.regulations.gov.¹ FRA understands that LIRR is a member of APTA and, as such, is a party to the relief granted to the Associations in FRA's three previous letters. Accordingly, FRA considers the relief already granted to the Associations in this docket responsive to LIRR's petition as it relates to the training and qualification of railroad employees, accident reporting, efficiency testing, locomotive engineer and conductor certification, equipment inspections, and with certain exceptions, LIRR's request for relief from certain signal and grade crossing warning system testing requirements.

PTC Requirements

With regard to LIRR's request for relief from certain reporting requirements related to positive train control (PTC) system implementation, FRA notes the requirements are statutory requirements under 49 U.S.C. § 20157 and as such, FRA is not authorized to waive the requirements.² In addition, FRA acknowledges that LIRR timely submitted its Annual PTC Progress Report³ for 2019 to FRA on March 24, 2020, before the statutory March 31st reporting deadline. *See* 49 U.S.C. § 20157(c)(1); 49 CFR § 236.1009(a)(5). Also, with respect to the other PTC provisions LIRR referenced in its Petition (i.e., 49 U.S.C. § 20157(j)(4) and 49 CFR § 236.1023(e)–(f)), those provisions currently do not apply to LIRR, as those reporting requirements apply only to *FRA-certified* PTC systems, and FRA has not yet certified LIRR's Advanced Civil Speed Enforcement System II. Accordingly, no relief from those reporting requirements is necessary at this time.

49 CFR Part 227

FRA's occupational noise exposure regulation (49 CFR Part 227) requires railroads to protect the occupational safety and health of employees exposed to noise in locomotive cabs. Section 227.107 requires railroads to administer a hearing conservation program for these employees and § 227.109 requires railroads, as part of their hearing conservation programs, to periodically offer and conduct audiograms of affected employees. In response to LIRR's request for relief from the requirements of §§ 227.107 and 227.109, FRA finds that granting temporary emergency relief is in the public interest, necessary to address the COVID-19 public health emergency, and is not inconsistent with railroad safety. Accordingly, FRA grants LIRR relief from the requirements of §§ 227.107 and 227.109 such that the deadline for offering employees audiograms or performing any required audiograms that come due during the duration of this waiver is extended for 60 days.⁴

¹ See <https://www.regulations.gov/document?D=FRA-2020-0002-0025>; <https://www.regulations.gov/document?D=FRA-2020-0002-0030>; and <https://www.regulations.gov/document?D=FRA-2020-0002-0041>.

² Specifically, LIRR requested relief from 49 CFR §§ 236.1023(e)–(f) and 236.1029, as well as 49 U.S.C. § 20157(j)(4). FRA acknowledges, however, that although LIRR cited to 49 CFR § 236.1029, the regulatory text LIRR quoted is from 49 CFR § 236.1009(a)(5). The requirement under 49 CFR § 236.1009(a)(5) to submit an Annual PTC Progress Report (Form FRA F 6180.166, OMB Control No. 2130-0553) by March 31st each year is also a *statutory* requirement under 49 U.S.C. § 20157(c)(1).

³ Form FRA F 6180.166, OMB Control No. 2130-0553.

⁴ This grant of relief is also consistent with the recommendations of the Council for Accreditation in Occupational Hearing Conservation: <https://www.caohc.org/UserFiles/PositionstatementCOVID-191.pdf>.

49 CFR Part 270

With respect to LIRR's request for a 60-day extension to the current implementation schedule for FRA's System Safety Program Final Rule (49 CFR Part 270),⁵ FRA notes that APTA has separately requested similar relief. FRA will respond to both APTA's and LIRR's requests related to Part 270 in a separate communication.

Drug and Alcohol Testing Requirements

Consistent with FRA's March 30, 2020, letter referenced above, no relief is granted from FRA's drug and alcohol testing requirements, but please see the following two guidance documents related to your request: *DOT Guidance on Compliance with Drug and Alcohol Testing Regulations*⁶ and *FRA Guidance on Drug and Alcohol Testing Requirements During the COVID-19 Public Health Emergency*.⁷

Hours of Service

Regarding LIRR's requests for relief from a number of hours of service regulatory and statutory requirements, LIRR asserts this relief will provide flexibility to address personnel shortages related to COVID-19. FRA is unable to grant the relief as requested, but grants partial relief as described below.

49 CFR § 228.405(a)(1-2) - Hours of Service: Minimum Rest Requirements

LIRR requests temporary emergency relief from the requirements of 49 CFR § 228.405(a)(1-2). Those paragraphs prohibit a railroad from requiring or allowing an employee to have less than 8 consecutive hours off duty within a 24-hour period, or, when an employee has been on duty for 12 consecutive hours, less than 10 consecutive hours off duty.

FRA believes having a minimum rest requirement is essential to limiting the fatigue of operating train crews. In analyzing LIRR's request, FRA considered the potential fatigue implications of the requested relief and determined that, while FRA could not grant LIRR the full relief requested, limited partial relief is justified. Accordingly, after careful consideration, FRA grants limited relief only to those employees working Type 1 assignments (assignments requiring employees to report for duty no earlier than 4:00 a.m. and to be released from duty no later than 8:00 pm that same calendar day). FRA is granting LIRR relief to the extent that train employees working assignments meeting the definition of a Type 1 Assignment may have only 8 consecutive hours off during a 24-hour period (even if they are on duty for 12 consecutive hours), but an individual employee may not be subject to this relief for more than 3 days within his or her cycle of consecutive days as detailed in the section below regarding Consecutive Duty Tour Days. The remaining duty tours within the cycle meeting the definition of a Type 1 assignment are subject to the requirements of this section. This relief is provided under the

⁵ 85 FR 12825 (March 4, 2020).

⁶ <https://www.transportation.gov/odapc/compliance-with-dot-drug-and-alcohol-testing-regulations>.

⁷ <https://railroads.dot.gov/elibrary/fra-guidance-drug-and-alcohol-testing-requirements-during-covid-19-public-health-emergency>.

following conditions:

1. LIRR must employ due diligence to avoid or limit any excess service, as required under 49 CFR Part 228, Appendix A;
2. This relief does not apply to train employees who work one or more Type 2 assignments (assignments containing any time on duty between 8:01 pm and 3:59 am on the next day) within their series of consecutive days;
3. LIRR must provide any employee subject to this relief an opportunity to be relieved from a covered service assignment without penalty to the employee, upon the employee's request due to fatigue; and
4. This relief may be used only when necessary to address personnel shortages directly related to the COVID-19 public health emergency.

49 CFR § 228.405(a)(3) - Hours of Service: Consecutive Duty Tour Days

LIRR requests temporary emergency relief from the requirements of 49 CFR § 228.405(a)(3). This paragraph limits the number of calendar days within a 14-calendar day cycle that a train employee engaged in commuter or intercity rail passenger transportation may be required or allowed to remain or go on duty. For a Type 1 assignment, § 228.405(a)(3)(i) requires that an employee have 2 calendar days off after a series of 14 consecutive calendar days in which the employee has not had at least 2 days off. If an employee works one or more Type 2 assignments, § 228.405(a)(3)(ii) requires the employee to have 24 hours off duty after initiating an on-duty period on 6 consecutive days. If an employee has initiated an on-duty period on 13 consecutive days without a day off, § 228.405(a)(3)(iii) requires the employee to have 2 calendar days off. Finally, §§ 228.405(a)(3)(iv) and 228.405(a)(3)(v) apply to employees who end their series at away from home terminals, and § 228.405(a)(3)(vi) provides that employees subject to multiple rest requirements will have them run concurrently.

FRA is unable to grant the full relief requested. However, FRA grants the following relief from these requirements. FRA grants relief from § 228.405(a)(3)(i) to allow train employees engaged in commuter or intercity rail passenger transportation who work only Type 1 assignments to initiate on-duty periods on no more than 21 consecutive calendar days without having at least 2 days off, before requiring 2 calendar days free from initiating an on-duty period, subject to the following conditions:

1. LIRR must continue to report any excess service as required under 49 CFR § 228.19;
2. LIRR must employ due diligence to avoid or limit any excess service, as required under 49 CFR Part 228, Appendix A;
3. This relief does not apply to train employees who work one or more Type 2 assignments (assignments containing any time on duty between 8:01 pm and 3:59 am on the next day) within the 21-day series;
4. LIRR must provide any employee working under the relief provided an opportunity to be relieved from a covered service assignment upon request due to fatigue without penalty to the employee; and
5. This relief is to be used only when necessary to address personnel shortages directly related to the COVID-19 public health emergency.

FRA grants relief from § 228.405(a)(3)(ii) to allow train employees engaged in commuter or intercity rail passenger transportation who work one or more Type 2 assignments to initiate on-duty periods on no more than 9 consecutive calendar days before requiring 24 hours free from initiating an on-duty period, subject to the following conditions:

1. LIRR must continue to report any excess service as required under 49 CFR § 228.19;
2. LIRR must employ due diligence to avoid or limit any excess service, as required under 49 CFR Part 228, Appendix A;
3. LIRR must provide any employee working under the relief granted an opportunity to be relieved from a covered service assignment upon request due to fatigue without penalty to the employee; and
4. This relief is to be used only when necessary to address personnel shortages directly related to the COVID-19 public health emergency.

FRA likewise grants relief from § 228.405(a)(3)(iii) to allow train employees engaged in commuter or intercity rail passenger transportation who work only Type 1 assignments to initiate on-duty periods on no more than 20 consecutive calendar days without a day off before requiring 2 calendar days free from initiating an on-duty period, subject to the same conditions stated above for §§ 228.405(a)(3)(i) and (ii).

Finally, FRA declines to grant relief from the requirements of §§ 228.405(a)(3)(iv), (v), and (vi) (addressing situations where employees report to or are relieved from duty at away-from-home terminals), because, at this time, the need for these requests is unclear. As LIRR does not have away-from-home terminals, it should not need relief from the rest requirements for employees ending their series at away-from-home terminals, and having multiple rest periods run concurrently, as provided in § 228.405(a)(3)(vi), should be beneficial.

49 U.S.C. § 21105

LIRR requests relief from the hours of service recordkeeping requirements for dispatchers at 49 CFR § 228.19(d)(1), which requires railroads to report excess service by dispatching service employees. FRA interprets the request as seeking relief from the statutory limitations of the hours of service laws pertaining to dispatching service employees required by 49 U.S.C. § 21105. Specifically, the petition requests a maximum duty tour of 12 hours at stations where 2 or more shifts are employed, for which the statute requires a 9-hour limitation. FRA does not have the authority to waive or modify these statutory requirements. The statute may provide railroads additional flexibility to respond to certain emergency situations, such as the COVID-19 public health emergency, although it does not allow FRA to modify statutory requirements in the manner requested. *See* 49 U.S.C. § 21102(a). However, FRA notes that railroads would be required to employ due diligence to reduce or eliminate excess service. In addition, FRA's hours of service recordkeeping regulations require railroads to identify the reason for each instance of excess service, even where excess service may be appropriate for relief under the statute (e.g., in this instance, where the excess service was unavoidable and a direct result of the impact of the COVID-19 public health emergency on LIRR).

As noted above, the relief granted in this letter is conditioned on the existence of workforce shortages and other constraints as a direct result of the impacts of the COVID-19 public health emergency, preventing LIRR from complying with the relevant regulatory provisions. If LIRR finds it necessary to utilize the waiver relief provided here, it must document the basis on which it concluded that availing itself of the relief was necessary and report the use of the relief to FRA weekly (i.e., the name of the individual(s) involved and the railroad territories or departments involved). The information must be provided in excel format via email to FRA (karl.alexey@dot.gov). LIRR must provide the information to FRA no later than each Tuesday for the previous Sunday – Saturday time-period.

This emergency waiver expires 60 days from the date of this letter, or when the FRA Administrator’s Emergency Declaration is revoked, whichever is sooner. FRA reserves the right to amend or revoke this waiver upon receipt of information pertaining to the safety of railroad operations, or in the event of non-compliance with any condition of this waiver.

FRA looks forward to working with you to help ensure the continued safety of railroad operations during this national emergency. If you have questions, I can be reached at 202-493-6282, or at karl.alexey@dot.gov.

Sincerely,

Karl Alexy
Associate Administrator for Railroad Safety
Chief Safety Officer