US Department
of Transportation
Federal Railroad
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 15 1999

Ms Yolanda M. Grimes, Esq
Legal Department
Burlington Northern Santa Fe Railway Company
3017 Lou Menk Drive
Fort Worth, Texas 76131

Dear Ms. Grimes:

Thank you for your letter of February 18, 1999, to Federal Railroad Administration (FRA) Regional Administrator Laurence H. Hasvold concerning FRA's interpretation of its regulations governing the use of utility employees, which are found in 49 C.F.R Part 218. Your letter was forwarded to the Safety Law Division of FRA's Office of Chief Counsel.

The primary issue raised in your letter is whether an employee originally assigned as a member of a train or yard crew may serve as a utility employee before his or her original train or yard crew has completed its service. For reasons set forth below, FRA has consistently stated that a member of an assigned train or yard crew may serve as a utility employee with another train or yard crew only after the completion of the assignment of the crew to which that employee was originally assigned.

FRA believes its reading of Part 218 is consistent with the text and regulatory history of the utility employee rule. "Utility employee" is specifically defined in Section 218.5 as "a railroad employee assigned to and functioning as a temporary member of a train or yard crew . . . " Use of a utility employee in concurrent service is prohibited under Section 218.22(b), which provides that such an employee "shall perform service as a member *of only one train or yard crew at any given time*" (emphasis added). Under Section 218.5, a "train or yard crew" is defined as "one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member, . . . involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew, *reporting and working together as a unit that remains in close contact* if more than one employee . . ." (emphasis added).

Consistent with the rule text, FRA considers train and yard crews to be specific groups of employees that report to work as an integral whole and stay together for their tour of duty. The clear implication of the definition of "utility employee" is that members of a train or yard crew who are not utility employees are not "temporary" members and are, instead, permanent members of that crew. More important, nothing in the definition of "train or yard crew" suggests that

members of such a crew may serve as temporary members of other crews during their assignment. On the contrary, that definition requires that, to be considered a train and yard crew that does not need blue signal protection, the crew report and work together "as a unit that remains in close contact" and be "involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew." Id. The agency believes that train and yard crews may safely perform their tasks without blue signal protection "because the characteristics of their activity provide alternative protection for the crew members. They work as a team and maintain communication with each other." *Section-by-Section Analysis, Final Rule, Protection of Utility Employees*, 58 Fed. Reg. 43288 (1993). FRA's intent in promulgating the utility employee regulation was to ensure that utility employees may work without blue signal protection only under narrowly defined conditions that provide these employees with the same level of protection afforded train and yard crews working under the blue signal exclusion. FRA noted that, "The utility employee is not covered in the exclusion principally because he or she is not called *for a tour of duty* as a member of the cohesive working unit . . . ." Id. (Emphasis added.) Prior to the utility employee final rule, a utility employee would always require full blue signal protection. FRA stated, "To avoid that necessity, the railroad can instead assign a brakeman to a crew *for an entire tour of duty*, even though that person's services are only required for a small portion of the duty tour." Id. (Emphasis added.)

Therefore, it has been clear from the time of the final rule that FRA has considered a train and yard crew to be one that is together for its entire tour of duty. In the final rule preamble, FRA explained the Section 218.22(b) prohibition against concurrent service for more than one crew by offering an example concerning a train or yard crew.

> For example, if an employee is assigned as a train crew member to one train *for an entire tour of duty*, that employee may not, while awaiting departure from the yard, be temporarily assigned to a second train crew to help them prepare to depart. On the other hand, a member of an inbound train crew at a crew change point, *whose assignment to the train is essentially completed*, could then be assigned as a utility employee to the outbound crew to assist in preparation for departure of the train . . .

58 Fed. Reg. 43290-91 (1993) (emphasis added).

Consistent with the preamble and rule text of Part 218, FRA has consistently read 218.22(b) in conjunction with the definition of train or yard crew in 218.5 to mean that any railroad employee called to work as an original member of a train or yard crew may not be assigned to perform service as a utility employee until the train or yard crew which that employee was initially called to work has completed its service. That is the only time that such a train or yard crew employee may be given a new assignment as a utility employee. Any other use of a train or yard crew member as a utility employee would be considered violative of the letter and the intent of 49 C.F.R. Part 218.

Letters issued by FRA's Office of Safety demonstrate that FRA has consistently read the relevant rules as it does now. For example, in a letter (copy attached) dated March 7, 1995, Deputy Associate Administrator Phil Olekszyk, in providing examples of what FRA would consider to be noncompliance with Part 218, stated that " a crewmember assigned to a train waiting to depart a yard . . . cannot serve as a utility employee with another train . . . because it would be construed as performing concurrent service . . . ."

Hopefully, this letter will serve to eliminate any misunderstandings concerning the intent and effect of 49 C.F.R. § 218.22. If you have any further questions concerning this matter, please do not hesitate to contact me or Trial Attorney Paul F. Byrnes.

Sincerely,

Daniel C. Smith
Assistant Chief Counsel for Safety

Enclosure