



MEMORANDUM

To: Norfolk Southern General Chairmen
cc: H. Wise, J. R. Cook, F. N. Simpson, P. K. Geller, S. V. Powers, D. Gates,
L. R. Fenhaus and B. Bon
From: Donald Griffin
Date: October 29, 2008
Subject: Camp Car language in Public Law 110-432 – Rail Safety Improvement Act of 2008

On October 16, 2008, President Bush signed H.R. 2095, the “Rail Safety Improvement Act of 2008.” This law is the first major revision of rail safety legislation since 1970 and also contains an Amtrak reauthorization and authorization for expenditures on expanded high-speed rail operations. This is one of a series of memoranda and circulars that will be prepared by the National Division regarding this massive piece of legislation.

The Rail Safety Improvement Act of 2008 amended Section 21106 of Title 49 in the following manner (insertions are in **bold** and deletions are ~~struck through~~).

(a) In General. *A railroad carrier and its officers and agents—*

*(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and **sanitary, give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier, and provide indoor toilet facilities, potable water, and other features to protect the health of employees** ~~sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier;~~ and*

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

(b) Camp Cars.—*Not later than December 31, 2009, any railroad carrier that uses camp cars shall fully retrofit or replace such cars in compliance with subsection (a).*

(c) Regulations.—*Not later than April 1, 2010, the Secretary of Transportation, in coordination with the Secretary of Labor, shall prescribe regulations to implement subsection (a)(1) to protect the safety and health of any employees and individuals*

employed to maintain the right of way of a railroad carrier that uses camp cars, which shall require that all camp cars comply with those regulations by December 31, 2010. In prescribing the regulations, the Secretary shall assess the action taken by any railroad carrier to fully retrofit or replace its camp cars pursuant to this section.

(d) Compliance and Enforcement.—The Secretary shall determine whether a railroad carrier has fully retrofitted or replaced a camp car pursuant to subsection (b) and shall prohibit the use of any non-compliant camp car. The Secretary may assess civil penalties pursuant to chapter 213 for violations of this section.

The enforcement provisions of this Section are contained in Title 49, Section 21303, which reads (as amended by the Rail Safety Improvement Act of 2008:

(a) Penalty.—

(1) Subject to section 21304 of this title, a person violating chapter 211 of this title, or violating any provision of a waiver applicable to that person that has been granted under section 21108 of this title, is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. For a violation of section 21106 of this title, a separate violation occurs for each day a facility is not in compliance.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least \$500 but not more than \$25,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than \$100,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) Civil Actions To Collect.—

(1) The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section after satisfactory information is presented to the Attorney General. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action under this subsection must be brought not later than 2 years after the date of the violation unless administrative notification under section 3711 of title 31 is given within that 2-year period to the person committing the violation. However, even if notification is given, the action must be brought within the period specified in section 2462 of title 28.

(c) Imputation of Knowledge.— In any proceeding under this section, a railroad carrier is deemed to know the acts of its officers and agents.

The key points of this new legislation are:

- the legislation does not outlaw the use of camp cars now, or in the future;
- existing camp cars must be retrofitted with equipment to meet the legislative mandate by December 31, 2009;
- enforcement authority is granted to the Secretary of Transportation to impose civil penalties for a railroad's failure to comply with requirements of Section 21106(a);
- additionally, the Secretaries of Transportation and Labor are charged with promulgating regulations to implement the requirements of the Section 21106(a). Significantly, these regulations are to be prescribed “no later” than April 1, 2010 to become effective December 31, 2010 which is one year after a railroad is required to be in compliance with Section 21106(a);
- substantively, the only change made to the old Section 21106 is the requirement that by December 31, 2009, any camp cars have potable water, indoor toilets and “other features to protect the health of employees,” whatever that term means.

What this probably means is that there will be little, if any, attempt at enforcement of the law until the regulations are prescribed and become effective, i.e., December 31, 2010. What is essential on BMWED's part is to actively participate in the notice and comment period when the regulations are first proposed and use all lawful means of pressure to ensure the regulations have “teeth” and provide a meaningful improvement in the condition of the camp cars and any associated commissary cars, if possible.

The final statutory language is a disappointing substantial weakening of language originally contained in the Bill that passed the House in 2007. That legislation contained the following provision in Section 202 providing for the elimination of camp cars:

(b) Camp Cars- Effective 12 months after the date of enactment of this subsection, a railroad carrier and its officers and agents may not provide sleeping quarters through the use of camp cars, as defined in Appendix C to part 228 of title 49 of the Code of Federal Regulations, for employees and any individuals employed to maintain the right of way of a railroad carrier.

The House Bill languished in the Senate for almost a year before it was taken up in August 2008

when the Senate adopted an amendment to the House Bill presented by Senator Lautenberg which included this Section 410 regarding camp cars:

(1) by inserting ``(a) In General.--" before ``A railroad carrier";

(2) by striking ``sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier;" in paragraph (1) and inserting ``sanitary, give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier, and provide indoor toilet facilities, potable water, and other features to protect the health of employees;" and

(3) by adding at the end the following:

``(b) Camp Cars.--No later than 12 months after the date of enactment of the Railroad Safety Enhancement Act of 2008, the Secretary, in consultation with the Secretary of Labor, shall prescribe regulations governing the use of camp cars, pursuant to subsection (a)(1), for employees and any individuals employed to maintain the right of way of a railroad carrier. The regulations may also prohibit the use of camp cars, if necessary, to protect the health and safety of the employees."

While Section 410 in the Senate Bill eliminated the House version's outright ban on camp cars, the legislation still granted discretion to the Secretary of Transportation to outlaw the use of camp cars. However, when the two competing Bills went to a joint House-Senate conference, the provisions of both Section 202 in the House Bill and Section 410 in the Senate Bill were superseded by the even more railroad-friendly language contained in the present law that does not ban camp cars outright nor even provide for their discretionary ban; but merely includes additional health and safety standards for them. Obviously, the conferees were convinced by persons unknown that it was acceptable to reduce the protections for employees in camp cars below that previously passed by both chambers. Who actually was involved in this process is unknown because the conference process is not public and those legislative decisions are made in complete privacy and anonymity.

One issue remains following passage of this law – the fate of the Indiana camp car legislation and other state initiatives attempted by the BMWED. Prior to passage of the Rail Safety Improvement Act of 2008, no Federal agency had promulgated regulations governing the application of the legal standards contained in the former Section 21106. Under the current law, the Secretaries of Transportation and Labor are charged with created a regulatory and enforcement environment to apply the standards contained in Section 21106(a). Whether this new Federal law pre-empts any state laws governing standards for camp cars is a matter for additional discussion.