

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228

[Docket No. FRA-2012-0101]

RIN: 2130-AC41

Hours of Service Recordkeeping; Automated Recordkeeping

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

ACTION: Final rule.

SUMMARY: This rule is part of FRA’s broader initiative to reduce the paperwork burden of its regulations while still supporting compliance with the Federal hours of service laws and regulations. Current regulations require employees covered by those laws or regulations (covered service employees) to create and retain hours of service records by hand (a paper system) or “certify” the record using a compliant computerized system (an electronic system) with program logic. Cognizant of the burden placed on small operations, FRA provides a simplified method of computerized recordkeeping (an automated system) — in which employees apply their electronic signatures to automated records stored in a railroad computer system without the complexity and functionality of an electronic system — for eligible smaller railroads (and contractors and subcontractors providing covered service employees to such railroads). This rule does not require the use of automated recordkeeping, but, when implemented by the small operations for which it is tailored, it will decrease the burden hours spent on hours of service recordkeeping.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] in accordance with 5 U.S.C. 553(d)(1).

ADDRESSES: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Patrick J. Hogan, Transportation Specialist, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue, SE., W33-448, Washington, DC 20590; telephone: 202-493-0277; email: Patrick.Hogan@dot.gov; Kyle Fields, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., W31-232, Washington, DC 20590; telephone 202-493-6168; email: Kyle.Fields@dot.gov; or Emily T. Prince, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., W31-216, Washington, DC 20590; telephone 202-493-6146; email: Emily.Prince@dot.gov.

SUPPLEMENTARY INFORMATION:

Commonly Used Abbreviations

CFR Code of Federal Regulations

FRA Federal Railroad Administration

HS hours of service

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I. Executive Summary

In 2009, FRA finalized amendments to the HS recordkeeping regulations at 49 CFR part 228 (part 228) to authorize electronic recordkeeping and reporting as a means of compliance with the Federal HS laws. In addition to certification requirements, see 49 CFR 228.9(b), these amendments added new subpart D to part 228, which established comprehensive requirements for electronic recordkeeping systems. Some smaller railroads informed FRA that the requirements of part 228, subpart D make electronic recordkeeping systems infeasible for their operations, which are less complex and

variable than larger railroads' operations. Some small railroads already use an automated system for covered service employees to enter required HS data, which the employees then print and sign as a paper HS record. This rule allows a railroad with less than 400,000 employee-hours annually (an "eligible smaller railroad"), and contractors and subcontractors that provide covered service employees to that railroad, to have employees electronically sign the automated records of their hours of duty and to store the records in the railroad's computer system. Thus, this rule eliminates the requirement to print and sign the record.

This rule amends part 228, subpart D by defining an "automated recordkeeping system" for eligible smaller railroads under new § 228.201(b) and outlining the requirements of such a system under new § 228.206, while retaining the definition of an "electronic recordkeeping system" as § 228.201(a) and the existing requirements under §§ 228.203–228.205. The rule also provides general requirements for automated records, such as electronic signatures, retention periods, and FRA access, under new § 228.9(c), and it modifies training requirements under § 228.207.

This rule allows an eligible smaller railroad to adopt an automated recordkeeping system without conforming to all the requirements for an electronic recordkeeping system. For example, new § 228.206 does not require an automated recordkeeping system to include some of the program components and other features that are not appropriate or necessary for the operations of eligible smaller railroads, although those features are important for an electronic recordkeeping system in light of the more complex operations of larger railroads. New § 228.206 includes requirements for FRA

and participating State inspector access to and ability to search an automated recordkeeping system to effectively monitor compliance with the HS laws and regulations, similar to the search capabilities and access requirements for electronic recordkeeping systems.

This rule significantly reduces costs and paperwork burdens for eligible smaller railroads because automated records require less time to complete than manual records and the records may be stored digitally, relieving eligible smaller railroads of the burden of storing and maintaining paper records. The costs of implementing an automated recordkeeping system are projected as substantially less than an electronic recordkeeping system and are relatively small compared to the benefits gained by eliminating a paper recordkeeping system. Adopting an automated recordkeeping system is purely voluntary, but FRA expects many eligible smaller railroads currently using manual records to begin creating and maintaining HS records using an automated system, with a projected reduction of over 194,000 burden hours. FRA's economic analysis projects an estimated \$87.6 million in net savings over a 10-year period as a result of this rule, and the present value of this savings is \$55.1 million (discounted at 7 percent). The final rule is expected to have no negative impact on safety, as it simply provides a voluntary option for eligible smaller railroads and their contractors and subcontractors to use an alternative means of compliance with recordkeeping obligations.

II. Background and History

Federal laws governing railroad employees' hours of service date back to 1907¹ and are presently codified at 49 U.S.C. 21101–21109,² 21303, and 21304.³ FRA, under 49 U.S.C. 103(g), 49 CFR 1.89, and internal delegations, has long administered the statutory HS requirements and the agency's HS recordkeeping and reporting regulations (49 CFR part 228, subpart B), which promote compliance with the HS laws. Currently, the HS statutory requirements cover three groups of employees: train employees, signal employees, and dispatching service employees, as those terms are defined at Sec. 21101. The HS recordkeeping and reporting regulations at 49 CFR 228.5 include the statutory definitions of these terms and FRA interpretations discuss them. See FRA's "Requirements of the Hours of Service Act; Statement of Agency Policy and Interpretation" at 49 CFR part 228, appendix A, most of which was issued in the 1970s, and subsequent FRA interpretations of the HS laws published in the *Federal Register*.

Congress has amended the HS statutory requirements several times over the years, most recently in the Rail Safety Improvement Act of 2008 (RSIA).⁴ The RSIA substantially amended the requirements of Secs. 21103 and 21104, applicable to a "train employee"⁵ and a "signal employee,"⁶ respectively, and added new provisions at Secs.

¹ See the Hours of Service Act (Pub. L. 59-274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Pub. L. 103-272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61-64b, and revised and reenacted its provisions, without substantive change, as positive law at 49 U.S.C. 21101–21108, 21303, and 21304. The Hours of Service Act was administered by the Interstate Commerce Commission until these duties were transferred to FRA in 1966.

² These sections may also be cited as 49 U.S.C. Chapter 211. Hereinafter, references to a "Sec." are to a section of title 49 of the U.S. Code unless otherwise specified.

³ For a table comparing and contrasting the current Federal HS requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations. 78 FR 58830, 58850–58854, Sept. 24, 2013.

⁴ Pub. L. 110-432, Div. A, 122 Stat. 4848.

⁵ See Sec. 21101(5).

⁶ See Sec. 21101(4). The RSIA also amended the definition of "signal employee" effective October 16, 2008. Before the RSIA, the term meant "an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems." Emphasis added.

21102(c) and 21109 that together made a train employee providing rail passenger transportation subject to HS regulations, not Sec. 21103, if the Secretary timely issued regulations. Subsequently, FRA, as the Secretary's delegate, timely issued those regulations, codified at 49 CFR part 228, subpart F (Passenger Train Employee HS Regulations), which became effective October 15, 2011.

Additionally, section 108(f)(1) of the RSIA required the Secretary to prescribe a regulation revising the requirements for recordkeeping and reporting for hours of service of railroad employees, specifically to authorize electronic record keeping and reporting of excess service and to require training of affected employees and supervisors, including training of employees in the entry of hours of service data. FRA, as the Secretary's delegate, also issued those regulations, codified at 49 CFR part 228, including subpart D (Electronic Recordkeeping), which became effective July 16, 2009. 74 FR 25330, May 27, 2009 (2009 Recordkeeping Amendments).⁷ __

In general, the 2009 Recordkeeping Amendments required that either employees recording their own time, or the reporting crewmember of a train crew or signal gang who was recording time, certify their electronic HS records, instead of signing them by hand, and that the recordkeeping system electronically stamp the records with the name

⁷ FRA issued its first HS recordkeeping regulation, codified at 49 CFR part 228, subparts A and B, in 1972. See 37 FR 12234, Jun. 21, 1972. Because the regulation did not contemplate electronic recordkeeping, it required HS records be signed manually by the employee whose time was being recorded. Therefore, prior to the effective date of the 2009 Recordkeeping Amendments, railroads that wished to create and maintain their required HS records electronically rather than manually needed FRA's waiver of the requirement for a handwritten signature. See FRA procedural regulations at 49 CFR part 211. At the time the 2009 recordkeeping amendments went into effect, several Class I railroads were creating and maintaining their required HS records using an electronic recordkeeping system approved by FRA pursuant to a waiver. See the preamble of the 2009 Recordkeeping Amendments for further discussion of the history of electronic recordkeeping and the development of waiver-approved electronic recordkeeping systems. See 74 FR 25330, 25330–25334.

of the certifying employee and the date and time of certification. *See* 49 CFR 228.9(b). These amendments also established comprehensive requirements for electronic recordkeeping systems. A brief summary of the most significant requirements follows.

- First, electronic recordkeeping systems must generate records that provide sufficient data fields for an employee to report a wide variety and number of activities that could arise during a duty tour. *See* 49 CFR 228.201.
- Second, the systems must have security features to control access to HS records and to identify any individual who entered information on a record. *See* 49 CFR 228.203(a)(1)(i), (a)(2)–(a)(7), and (b).
- Third, systems must include program logic that identifies how periods of time spent in any activity that is entered on a record are treated under the HS laws (and the substantive HS regulations for passenger train employees).
- Fourth, program logic must allow the systems to calculate total time on duty from the data the employee entered, flag employee-input errors so the employee can correct them before certifying the record, and require the employee to enter an explanation when the data entered shows a violation of the HS laws or regulations. *See* 49 CFR 228.203(c).
- Fifth, electronic recordkeeping systems must provide a method known as a “quick tie-up” for employees to enter limited HS information when they have met or exceeded the maximum hours allowed for the duty tour, and railroads must have procedures for employees to do a quick tie-up by telephone or facsimile (fax) if computer access is not available. *See* 49 CFR 228.5 and

228.203(a)(1)(ii).

- Finally, an electronic recordkeeping system must provide search capability so records may be searched by date or date range and by employee name or identification number, train or job assignment, origin or release location, territory, and by records showing excess service. The results of any such search must yield all records matching specified criteria. *See* 49 CFR 228.203(d).

III. Scope of the Final Rule

The final rule applies only to eligible smaller railroads⁸, as well as contractors and subcontractors to such eligible smaller railroads. FRA is aware that some railroads have been using an automated system in which covered service employees access a blank HS record on a railroad computer, enter required data on the form, and then print and sign the record. The printed record is still considered a manual or paper record, with the associated burden of storage placed on the railroad. FRA expects many eligible smaller railroads will choose to comply with this rule using existing equipment and software already in use. For example, many eligible smaller railroads will find their existing equipment and software can generate forms that will allow employees to enter the information relevant to their duty tours as required by § 228.11 and save those records in a directory structure that would allow either the railroad or FRA to retrieve them using the search criteria provided in this rule.

⁸ Railroads that: (1) reported less than 400,000 employee hours to FRA during the preceding three consecutive calendar years under 49 CFR 225.21(d) on Form FRA 6180.55, Annual Railroad Reports of Manhours by State; or (2) operating less than three consecutive calendar years that reported less than 400,000 employee hours to FRA during the current calendar year under 49 CFR 225.21(d) on Form FRA 6180.55, Annual Railroad Reports of Manhours by State.

Contractors and subcontractors to eligible smaller railroads are also eligible to use automated recordkeeping systems for their employees working on eligible smaller railroads, but not for their employees working on ineligible railroads. For instance, a contractor or subcontractor that performs covered service for both eligible smaller railroads and Class I railroads is not eligible to use an automated recordkeeping system for the hours of service records of its employees working for Class I railroads. If a contractor or subcontractor small enough to be eligible to use an automated recordkeeping system under this rule performs service for eligible and ineligible railroads and seeks to use an automated recordkeeping system, such a contractor or subcontractor may pursue relief through the waiver process, under 49 CFR 211.41.

It is appropriate to allow the eligible smaller railroads to use an automated recordkeeping system that lacks the programming and analysis capabilities required of an electronic recordkeeping system because of the less complex and less varied nature of the operations of eligible smaller railroads. For example, this rule does not require an automated system to calculate and fill in total time on duty based on the information an employee enters because that would require costly programming to enable the system to identify how various periods of time are treated. Instead, an employee will enter that information just as if the automated record were a paper record. Similarly, the rule does not require an automated system to include costly programming that would prompt the employee to enter an explanation of a duty tour over 12 hours or that would flag possible input errors or missing data (for example, showing an on-duty location that differs from the released location of the previous duty tour).

Approximately 746 railroads, 18 commuter railroads, and their contractors and subcontractors, are eligible to use automated recordkeeping systems pursuant to this rule. FRA declines to extend this rule to railroads with 400,000 or more employee-hours annually because the number of employees, volume of HS records, and complexity of operations associated with larger railroads requires a more sophisticated electronic recordkeeping system that complies with part 228, subpart D if those operations want to use an alternative to manual records.⁹ A larger and more complex operation benefits from an electronic recordkeeping system's program logic that helps to ensure accurate recordkeeping, and search capabilities that help to better identify relevant records for the railroad's own review and in response to FRA requests.

Among commuter railroads, for example, Metro-North Commuter Railroad is currently using an electronic recordkeeping system, and New Jersey Transit Railroad is developing an electronic recordkeeping system. FRA understands that these railroads are willing to share some information with other commuter railroads that are ineligible for automated recordkeeping systems to help them develop electronic recordkeeping systems compliant with part 228, subpart D. By developing these partnerships, larger commuter railroads will have a cost-effective opportunity to eliminate paper records and adopt electronic recordkeeping systems even if they do not qualify for automated recordkeeping under this rule. For these reasons, FRA adopts this rule applicable only to eligible smaller railroads.

⁹ FRA also declines to adopt a *per se* rule allowing Class III railroads to use automated recordkeeping because the definition of "Class III railroad" includes all terminal and switching operations, regardless of operating revenue, some of which have extensive operations more appropriately served by an electronic recordkeeping system. See 49 CFR 1201.1-1(d). Accordingly, FRA chose to define the rule's applicability based on employee hours.

IV. Discussion of Comments

FRA received two public comments on the automated recordkeeping NPRM. The American Short Line and Regional Railroad Association filed a short comment October 23, 2015, indicating the NPRM accurately assessed the ability of small railroads to capture HS data and expressing eagerness to see a final rule in effect. FRA also received an anonymous comment October 22, 2015, indicating only that the NPRM was, “Good.” FRA received no public comments conveying a need to change the scope or substance of the proposed rule.

V. Section-by-Section Analysis

Subpart A—General

Section 228.5 Definitions.

FRA adds definitions of “automated recordkeeping system”; “electronic recordkeeping system”; “electronic signature”; and “eligible smaller railroad.”

The definitions of “automated recordkeeping system” and “electronic recordkeeping system” distinguish the automated systems subject to this rulemaking, which are required to conform to the requirements of new §§ 228.201(b) and 228.206, from the electronic recordkeeping systems that must meet the pre-existing requirements of §§ 228.201(a) and 228.203–228.205.

The definition of “electronic signature” is consistent with the Electronic Signatures in Global and National Commerce Act.¹⁰ It allows railroads the choice of using two different types of electronic signatures for their employees to sign their HS

¹⁰ Pub. L. 106–229, 114 Stat. 472 (2000); see 15 U.S.C. 7006.

records: either (1) a unique digital signature, created based on the employee's identification number and password, or other means used to uniquely identify the employee in the automated recordkeeping system; or (2) a unique digitized version of the employee's handwritten signature that would be applied to the HS record.¹¹ The definition also provides the electronic signature must be created as provided in § 228.19(g) (existing regulatory requirements for creating an electronic signature for railroads' use on their reports of excess service) or § 228.206(a) (new requirements for creating electronic signatures for use on employees' HS records in an automated recordkeeping system).

This rule defines an "eligible smaller railroad", in general, as a railroad with less than 400,000 employee hours annually, which is eligible to use an automated recordkeeping system under this rule. More specifically, an eligible smaller railroad is defined as a railroad that has reported to FRA it had less than 400,000 employee hours during the preceding three consecutive calendar years on Form FRA 6180.55—Annual Railroad Reports of Manhours by State, as required by 49 CFR 225.21(d). As an exception to the general rule, railroads that have not been operating for three prior consecutive calendar years and expect to have less than 400,000 employee hours annually during the current year may use an automated recordkeeping system. This final rule combines the substantive content of the proposed definitions of "eligible smaller railroad" and "railroad that has less than 400,000 employee hours annually" into the final

¹¹ If a railroad creates an electronic signature that is a unique digital signature for each of its employees, the employee's HS record will be signed with the employee's printed name or other identifying information, when the employee signs the record using his or her electronic signature. If the railroad instead creates a digitized version of the employee's handwritten signature, the record will be signed with the employee's handwritten signature when the employee signs the record using his or her electronic signature.

definition of “eligible smaller railroad.”

Section 228.9 Records; general.

New § 228.9(c) establishes requirements for automated records that parallel the requirements of paragraph (a) for manual records and paragraph (b) for electronic records. Paragraph (c) requires that automated records be electronically signed and stamped with the certifying employee’s electronic signature that meets the requirements of § 228.206(a) and the date and time that the employee electronically signed the record. As in paragraphs (a) and (b), paragraph (c) contains requirements for retaining and accessing the records. Unlike paragraph (b) applicable to electronic records, paragraph (c) does not require using an employee identification (ID) and password to access automated records.¹² While some eligible smaller railroads might choose to provide an ID and password for the purpose of accessing an automated system, FRA concludes mandating an ID and password would be more complex than necessary for smaller operations, which may choose, for example, to have a railroad official directly provide access.¹³ Finally, paragraph (c) requires automated records be capable of being reproduced on printers available at the location where records are accessed, meaning railroads must have printers available at any location where they provide access to records. This requirement also applies to electronic recordkeeping systems under § 228.9(b).

¹² Employee ID and passwords are necessary for employees to certify their hours of service records, but are not required as a mechanism for providing access to the automated recordkeeping system.

¹³ It is important to note access must be available as soon as possible and no later than 24 hours after a request, as required by § 228.206(e)(2), as discussed further below. In addition, railroads and managers risk civil and criminal liability if they control access to an automated recordkeeping system in a manner that prevents employees from accurately reporting their hours of service.

Section 228.11 Hours of duty records.

Section 228.11(a) requires each railroad, or a contractor or a subcontractor that provides covered service employees to a railroad, to “keep a record, either manually or electronically, concerning the hours of duty of each employee.” Because HS records created and maintained using an automated recordkeeping system will also be required to comply with the requirements of § 228.11 (*see* section-by-section analysis of § 228.201(b) below), this rule removes the words “either manually or electronically” from the requirement.

Section 228.201 Electronic recordkeeping system and automated recordkeeping system: general.

FRA retains the pre-existing requirements of this section for electronic recordkeeping systems as paragraph (a) and adopts new paragraph (b) with similar but simplified requirements for automated recordkeeping systems, in part by cross-referencing those requirements of paragraph (a) also applicable to automated recordkeeping systems. The rule makes minor non-substantive changes to paragraphs (a)(3), (a)(4), and (a)(5) to correct typographical errors, specifically by deleting the “and” after paragraph (a)(3), replacing the periods at the end of paragraphs (a)(4) and (a)(5) with semicolons, and adding “and” after the semicolon at the end of paragraph (a)(5). New § 228.201(b)(1) requires an automated recordkeeping system to comply with new § 228.206. New § 228.201(b)(2) requires eligible smaller railroads using automated recordkeeping systems to comply with the requirements of paragraphs (a)(2) and (a)(4)–(a)(6), requirements also applicable to electronic records and recordkeeping systems. The main difference between the requirements of new § 228.201(b)(2) for automated records

and recordkeeping systems and the corresponding existing requirements for electronic records and recordkeeping systems is that automated systems are not required to have monitoring indicators in the system to help the railroad monitor the accuracy of the records. Eligible smaller railroads, however, remain responsible for the accuracy of their required HS records, regardless of whether the record is manual, automated, or electronic.

Finally, under new § 228.201(c), if a railroad, or a contractor or subcontractor to a railroad with an automated recordkeeping system, ceases to qualify as an “eligible smaller railroad” based on the new definition in § 228.5, that railroad, or contractor or subcontractor to a railroad, may not use an automated recordkeeping system unless FRA grants a waiver under 49 CFR 211.41. As described above, FRA believes larger railroads are better served by the use of an electronic recordkeeping system. In most cases, a railroad with such growth for three consecutive calendar years will have had sufficient time and funding to transition to an electronic recordkeeping system.

Section 228.206 Requirements for automated records and recordkeeping systems on eligible smaller railroads.

New § 228.206 establishes the requirements for an automated recordkeeping system, some of which are similar to the requirements for electronic recordkeeping systems found in §§ 228.203 and 228.205. As discussed in Section III above, however, § 228.206 is tailored to the nature and lesser complexity of the operations of eligible smaller railroads. Therefore, the rule does not require an automated system to include some of the program components and other features that apply to electronic recordkeeping systems. These elements are not appropriate or necessary for the operations of eligible smaller railroads; however, the rule requires other elements for the

automated systems not used in an electronic recordkeeping system.

Paragraph (a) mandates an employee creating an automated record must sign the record and establishes the requirements for an electronic signature. These requirements largely track paragraph (g) of § 228.19, which explains the requirements for railroads to establish and use electronic signatures for filing reports of excess service. These requirements are unique to automated recordkeeping systems and do not apply to electronic recordkeeping systems.

Paragraph (b) provides standards for system security of automated recordkeeping systems. Eligible smaller railroads must control access to the automated recordkeeping system using a user name and password or comparable method. Paragraph (b)(1) restricts data entry to the employee, train crew, or signal gang whose time is being reported, although a railroad may pre-populate some of the known factual data on its employees' HS records. An employee's name or identification number, or the on-duty time for an employee who works a regular schedule, are examples of the kind of data that the automated system can pre-populate; however, the regulation requires that the employee may make changes to any pre-populated data at all times without requiring permission or authorization from any third party, such as, but not limited to, a railroad manager.

Paragraph (b)(2) requires no two individuals have the same electronic signature, and paragraph (b)(3) requires the system not permit the deletion or alteration of an electronically-signed automated record. Paragraphs (b)(4) and (b)(5) together require that any amendment to a record must (1) be stored digitally apart from the record it amends or attached as information without altering the record and (2) identify the person making the

amendment. Finally, paragraphs (b)(6) and (b)(7) require the automated recordkeeping systems maintain records as submitted without corruption or loss of data and ensure supervisors and crew management officials can access, but not delete or alter, an automated record after an employee electronically signs the record. The proposed rule did not establish a specific interval for railroads to back-up the data contained in their automated recordkeeping system. FRA requested comments on the appropriate interval and method of data back-up, but did not receive any comments on this issue. To guarantee sufficient data redundancy to prevent substantial loss of HS records, paragraph (b)(6) now requires back-up of automated recordkeeping systems at least quarterly.

Paragraph (c) requires the automated recordkeeping system to identify each individual who enters data on a record and which data items each individual entered if more than one person entered data on a given record.

Paragraph (d) establishes the required search capabilities for an automated recordkeeping system. Though the rule provides specific data fields and other criteria the system must be able to use to search for and retrieve responsive records, the requirements are notably less complex than those for an electronic recordkeeping system.

Paragraph (e) establishes the requirements for access to automated recordkeeping systems. Eligible smaller railroads must grant FRA inspectors, and participating State inspectors, access to the system using railroad computer terminals as soon as possible, and no later than 24 hours after a request for access. The access must make visible each data field an employee completed, and data fields must be searchable as described in paragraph (d).

Section 228.207 Training.

This rule revises the training requirements of part 228. Specifically, paragraph (b) of this section, which sets forth the components of initial training, will now require training on how to enter HS data into an automated system. The paragraph currently requires training of employees on the electronic recordkeeping system or the appropriate paper records used by the railroad, contractor, or subcontractor for whom the employees perform covered service. Paragraph (b) will now include a similar training requirement for eligible smaller railroads that develop an automated recordkeeping system in compliance with this rule.

Similarly, this rule revises paragraph (c) of this section to specifically require eligible smaller railroads with automated systems to provide refresher training emphasizing any changes in HS substantive requirements, HS recordkeeping requirements, or a railroad's HS recordkeeping system since the employee was last provided training. FRA expects any railroad implementing an automated recordkeeping system to replace previously-used paper records would need to provide training on the use of that system to its employees, even if those employees had previously received training for paper records as required by this section.

VI. Regulatory Impact and Notices

A. Executive Orders 12866, 13563, and 13771 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures under Executive Order 12866, Executive Order 13563, Executive Order

13771, and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979; 76 FR 3821, Jan. 21, 2011; 82 FR 9339, Jan. 30, 2017. OMB designated this rule nonsignificant. FRA prepared and placed in the docket a Regulatory Evaluation addressing the economic impacts of this rule.

FRA will now allow eligible smaller railroads, and their contractors and subcontractors, to use automated recordkeeping systems, a simpler alternative to electronic recordkeeping systems that are infeasible for them, because their operations are less complex and variable than the operations of larger railroads. Both electronic and automated records require substantially less time to complete and cost less to store than manual records. Under this rule, eligible smaller railroads can take advantage of paper-saving technology to create and maintain hours of duty records as required by 49 CFR part 228, subpart B without complying with the more-stringent requirements for electronic recordkeeping systems under 49 CFR part 228, subpart D that may not be relevant to their operations. As part of its regulatory evaluation, FRA explained the benefits/cost savings of automated records and recordkeeping systems under this rule and provided a monetized value. The rule substantially reduces costs compared to current paper recordkeeping systems by allowing eligible smaller railroads to use automated recordkeeping systems. FRA believes the majority of eligible smaller railroads will take advantage of the opportunity for cost savings and incur a small burden to realize projected significant net cost savings. The final rule also follows the direction of Executive Order 13563, which emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Finally, this final rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

FRA estimates this regulation will result in a total estimated reduction of just over 194,000 burden hours annually. Based on railroads' annual 6180.55 reports to FRA for 2016, this rule will apply to a total of approximately 764 railroads with less than 400,000 employee-hours annually. These 764 railroads include the eligible employees of 746 probable small freight railroads and 18 small commuter railroads, as well as their contractors and subcontractors. FRA estimates 615 of these entities will adopt an automated recordkeeping system: 80 percent of the 746 small railroads and all 18 of the small commuter railroads.

The economic analysis¹⁴ provides a quantitative evaluation of the costs, cost savings, and benefits of the rule. The cost savings equals the reduced time an employee spends entering hours of duty in an automated system compared to the time they currently spend to manually produce a paper record of hours on duty. FRA calculated a reduction of 8 minutes per record.

FRA estimated the net cost savings expected from this final rule. In particular, over a 10-year period, \$87.6 million in net savings could accrue through the adoption of automated recordkeeping systems. The present value of this savings is \$55.1 million (discounted at 7 percent). FRA concludes the eligible small railroads would benefit significantly from adoption of the final rule.

¹⁴ The Regulatory Evaluation for Docket No. FRA-2012-101, Notice No. 2, is placed in the regulatory docket for this final rule.

Railroads are already producing HS records manually on paper records to comply with 49 CFR 228.11, and adopting an automated recordkeeping system is voluntary. FRA expects a relatively small implementation investment cost for railroads electing to use the automated system to realize the significant benefits (cost burden reduction). Costs are primarily labor driven along with the potential purchase of hardware¹⁵ and software¹⁶. FRA estimates that if each of these railroads were to expend \$5,590 discounted at 7 percent over a 10-year period to set up and operate an automated recordkeeping system for HS records, the railroads would reduce their paperwork burden by \$95,174 discounted at 7 percent over that same period.

Therefore, this final rule would have a positive effect on these railroads, saving each railroad approximately a net \$89,584 in costs at discounted 7 percent over the 10-year analysis. The table below presents the estimated net cost savings associated with the final rule, over the 10-year analysis.

Table 1.

10-Year Estimated Net Cost Savings of Final Rule	
Costs to prepare and operate automated record keeping	\$3,438,058
Cost Savings: Reduced Hours of recordkeeping	\$58,532,167
Net Cost Savings	\$55,094,109

Dollars are discounted at a present value rate of 7%.

B. Regulatory Flexibility Determination

Both the Regulatory Flexibility Act (RFA), Pub. L. 96-354, as amended, and

¹⁵ The equipment needed for an automated recordkeeping system includes, a PC and other computer accessories such as printers.

¹⁶ Examples of the types of software that might be purchased are simple programmable accounting type spreadsheets, or electronic signature and encryption software.

codified as amended at 5 U.S.C. 601-612, and Executive Order 13272—Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461, Aug. 16, 2002, require agency review of proposed and final rules to assess their impact on “small entities” for purposes of the RFA. An agency must prepare a regulatory flexibility analysis unless it determines and certifies a final rule is not expected to have a significant impact on a substantial number of small entities. Pursuant to the RFA, 5 U.S.C. 605(b), the Administrator of FRA certifies this final rule will not have a significant economic impact on a substantial number of small entities. Although this final rule could affect many small railroads, they may voluntarily adopt the requirements. Moreover, the effect on those railroads that do voluntarily adopt the requirements is primarily beneficial and not significant because it will reduce their labor burden for hours of service recordkeeping and reporting.

The term “small entity” is defined in 5 U.S.C. 601 (Section 601). Section 601(6) defines “small entity” as having the same meaning as “the terms ‘small business’, ‘small organization’ and ‘small governmental jurisdiction’ defined in paragraphs (3), (4), and (5) of this section.” In turn, Section 601(3) defines a “small business” as generally having the same meaning as “small business concern” under Section 3 of the Small Business Act, and includes any a small business concern that is independently owned and operated, and is not dominant in its field of operation. Next, Sec. 601(4) defines “small organization” as generally meaning any not-for-profit enterprises that is independently owned and operated, and not dominant in its field of operations. Additionally, Sec. 601(5) defines “small governmental jurisdiction” in general to include governments of

cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates “size standards” for small entities. It provides that, in order to qualify for “small entity” status, a for-profit railroad business firm may have a maximum of 1,500 employees for “Line-Haul Operating” railroads and 500 employees for “Short-Line Operating” railroads. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Under exceptions in Section 601, Federal agencies may adopt their own size standards for small entities in consultation with SBA, and in conjunction with public comment. Under that authority, FRA published a “Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws” (Policy) which formally establishes that small entities include among others, the following: (1) railroads that Surface Transportation Board (STB) regulations classify as Class III and (2) commuter railroads “that serve populations of 50,000 or less.”¹⁷ See 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. Currently, railroads eligible for small entity status under the Policy also must have \$20 million or less in annual operating revenue, adjusted annually for inflation. The \$20 million limit (adjusted annually for inflation) is based on the STB’s threshold for a Class III railroad, which is adjusted by applying the railroad

¹⁷ “In the Interim Policy Statement [62 FR 43024, Aug. 11, 1997], FRA defined ‘small entity,’ for the purpose of communication and enforcement policies, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Equal Access for Justice Act 5 U.S.C. 501 *et seq.*, to include only railroads which are classified as Class III. FRA further clarified the definition to include, in addition to Class III railroads, hazardous materials shippers that meet the income level established for Class III railroads (those with annual operating revenues of \$20 million per year or less, as set forth in 49 CFR 1201.1-1); railroad contractors that meet the income level established for Class III railroads; and those commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less.” 68 FR 24892 (May 9, 2003). “The Final Policy Statement issued today is substantially the same as the Interim Policy Statement.” 68 FR 24894.

revenue deflator adjustment. For further information on the calculation of the specific dollar limit, *see* 49 CFR part 1201. FRA uses this definition of “small entity” for this final rule.

FRA amends its hours of service recordkeeping regulations to provide simplified recordkeeping requirements by allowing eligible smaller railroads, and their contractors and subcontractors, to utilize an automated system to create and maintain hours of duty records as required by 49 CFR 228.11. As stated above, FRA reports indicate there are 742 Class III railroads that are eligible to use the simplified automated recordkeeping system this final rule provides. However, if they are affected, it is voluntary because this final rule does not require any railroad to develop and use an automated recordkeeping system. As stated above, there are also 18 commuter railroads, each of which is run by a State, County, or Municipal Agency, eligible under this final rule to develop and use an automated recordkeeping system, but all serve populations of 50,000 or more and are not designated as small businesses.¹⁸

FRA estimates 80 percent of small railroads and all small commuter railroads to convert to automated recordkeeping. For the purposes of this analysis, the 615 railroads FRA estimates are affected by this final rule are assumed to be small railroads. However, as discussed above, the economic impact on these small railroads is not significant. This final rule does not affect any other small entities other than these small railroads. As stated above in Section VI.A., although FRA estimates each of these railroads will

¹⁸ Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), “small governmental jurisdictions” are governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

expend \$5,590, this final rule will have a positive net economic effect on these railroads, saving each railroad approximately \$89,584 in costs at discounted 7 percent over the 10-year period analyzed. Since this amount is relatively small and beneficial, FRA concludes this final rule does not have a significant impact on these railroads.

To determine the significance of the economic impact for this RFA, during the NPRM process, FRA invited comments from all interested parties concerning the potential economic impact of this rulemaking on small entities. However, FRA did not receive any comments related to small entities.

FRA expects the final rule will reduce the paperwork burden for smaller railroads. Therefore, this RFA concludes this final rule will not cause an economic impact on any small entities.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the FRA Administrator hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. FRA continues to invite comments from members of the public who foresee a significant impact.

C. Federalism

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The executive order defines “policies that have federalism implications” to include regulations that have “substantial direct effects 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.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA analyzed this final rule consistent with the principles and criteria contained in Executive Order 13132. FRA determined the final rule will not have substantial direct effects on States, on the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA determined this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This final rule amends FRA’s HS reporting and recordkeeping regulations to allow a railroad with less than 400,000 employee hours annually, and a contractor or subcontractor providing covered service employees to such a railroad, to create and maintain HS records for its covered service employees using an automated recordkeeping system. FRA is not aware of any State with regulations covering the subject of this final rule. However, FRA notes this rule could have preemptive effect under Section 20106 of the former Federal Railroad Safety Act of 1970, that Congress repealed, reenacted

without substantive change, codified at 49 U.S.C. 20106, and later amended (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters), unless the State law, regulation, or order (1) qualifies under the “essentially local safety or security hazard” exception to Section 20106, (2) is not incompatible with a law, regulation, or order of the U.S. Government, and (3) does not unreasonably burden interstate commerce.

In sum, FRA analyzed this final rule consistent with the principles and criteria contained in Executive Order 13132. As explained above, FRA determined this final rule has no federalism implications other than possible preemption of State laws under 49 U.S.C. 20106 and 21109 (providing regulatory authority for hours of service). Accordingly, FRA determined it is not required to prepare a federalism summary impact statement for this final rule.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards, and, where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United

States.

E. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section - 49 CFR	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
228.11 - Hours of duty records	785 railroads/signal contractors & subcontractors	27,511,875 records	2 min./5 min./8 min.	2,733,439 hours
228.17 – Dispatchers record of train movements	150 dispatch offices	200,750 records	3 hours	602,250 hours
228.19 - Monthly reports of excess service	300 railroads	2,670 reports	2 hours	5,340 hours
228.103 - Construction of Employee Sleeping Quarters – Petitions to allow construction near work areas	50 railroads	1 petition	16 hours	16 hours
228.201(b) - Electronic recordkeeping system and Automated system – RR automated systems (Revised Requirement)	764 railroads	615 automated systems	24 hours	14,760 hours
(c) – Waiver requests by railroads/contractors/subcontractors no longer eligible use an automated recordkeeping system to refrain from having to begin keeping manual or electronic records or refrain from retaining its automated records as required under section 228.9(c) (New Requirement)	615 railroads	2 waiver requests	8 hours	16 hours
228.206 – New Requirements - Requirements for automated records and for automated recordkeeping systems on eligible smaller railroads, and their contractors or subcontractors that provide covered service employees to such railroads	100,500 employees	19,365 signed certifications	5 minutes	1,614 hours
: Certification of employee’s electronic signature	100,500 employees	75 signed certifications	5 minutes	6 hours
-- Additional certification/testimony provided by employee upon FRA request	615 railroads	615 procedures	90 minutes	923 hours
--Procedure for providing FRA/state inspector with system access upon request				

CFR Section - 49 CFR	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
228.207 – Revised Requirements - Training in use of electronic or automated system – Initial training – Employee refresher training on relevant changes to hours of service laws, the recording or reporting requirements in Subparts B and D of this Part, or the electronic, automated, or manual recordkeeping system of the railroad/contractor	615 railroads	5,931 trained employees	2 hours	11,862 hours
	785 railroads/contractors & subcontractors	47,000 trained employees	1 hour	47,000 hours
49 U.S.C. 21102 – The Federal Hours of Service Laws - Petitions for exemption from laws	10 railroads	1 petition	10 hours	10 hours
228.407 – Analysis of work schedules – RR analysis of one cycle of work schedules of employees engaged in commuter or intercity passenger transportation - RR Report to FRA Administrator of each work schedule that exceeds fatigue threshold -- RR Fatigue mitigation plan – submission and FRA approval -- Work schedules, proposed mitigation plans/ tools, determinations of operational necessity – found deficient by FRA and needing correction -- Follow-up analyses submitted to FRA for approval -- Deficiencies found by FRA in revised work schedules and accompanying fatigue mitigation tools and determinations of operational necessity needing correction - Updated fatigue mitigation plans - RR Consultation with directly affected employees on: (i) RR Work schedules at risk for fatigue level possibly compromising safety; and (ii) Railroad’s selection of fatigue mitigation tools; and (iii) All RR Submissions required by this section seeking FRA approval -- Filed employee statements with FRA explaining any issues related to paragraph (f)(1) of this section where consensus was not reached	168 railroads	2 analyses	20 hours	40 hours
	168 railroads	1 report	2 hours	2 hours
	168 railroads	1 plan	4 hours	4 hours
	168 railroads	1 corrected document	2 hours	2 hours
	168 railroads	5 analyses	4 hours	20 hours
	168 railroads	1 corrected document	2 hours	2 hours
	168 railroads 168 railroads	8 plans 5 consultations	4 hours 2 hours	32 hours 10 hours
	RR Employee Organizations	2 filed statements	2 hours	4 hours

CFR Section - 49 CFR	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
228.411 – RR Training programs on fatigue and related topics (e.g., rest, alertness, changes in rest cycles, etc.)	168 railroads	14 training programs	5 hours	70 hours
-- Refresher training for new employees	168 railroads	150 initially tr. employees	1 hour	150 hours
-- RR Every 3-Years refresher training for existing employees	168 railroads	3,400 trained employees	1 hour	3,400 hours
-- RR Record of employees trained in compliance with this section	168 railroads	3,550 records	5 minutes	296 hours
-- Written declaration to FRA by tourist, scenic, historic, or excursion RR seeking exclusion from this section’s requirements because its employees are assigned schedules wholly within the hours of 4 a.m. to 8 p.m. on the same calendar day that comply with the provisions of section 228.405	140 railroads	2 written declarations	1 hour	2 hours
Appendix D – Guidance on fatigue management plan – RR reviewed and updated fatigue management plans	168 railroads	2 updated plans	10 hours	20 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA’s estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Collection Clearance Officer, Office of Railroad Safety, at 202-493-6292, or Ms. Kim Toone, Information Collection Clearance Officer, Office of Railroad

Administration, at 202-493-6132, or via e-mail at the following addresses:

Robert.Brogan@dot.gov; Kim.Toone@dot.gov.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address: oir-submissions@omb.eop.gov.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number assigned to the collection of information associated with the current rule is **OMB No. 2130-0005**.

F. Environmental Assessment

FRA evaluated this final rule consistent with its “Procedures for Considering Environmental Impacts” (FRA’s 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 determined this

final rule 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 under section 4(c)(20) of FRA's Procedures. See 64 FR 28547, May 26, 1999. Section 4(c)(20) states certain classes of FRA actions have been determined to be categorically excluded from the requirements of FRA's Procedures as they do not individually or cumulatively have a significant effect on the human environment, including the promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

FRA further concluded no extraordinary circumstances exist with respect to this final regulation that might trigger the need for a more detailed environmental review under sections 4(c) and (e) of FRA's Procedures. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires written statements from agencies before promulgating any general notice of proposed rulemaking that includes any Federal mandate that may result in expenditure by State,

local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year and before promulgating any final rule for which a general notice of proposed rulemaking was published. The written statement, if required, would detail the effect on State, local, and tribal governments and the private sector.

For the year 2015, FRA adjusted the monetary amount of \$100,000,000 to \$156,000,000 for inflation. This final rule would not result in the expenditure of more than \$156,000,000 by the public sector in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, “significant energy action” means 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 a notice of inquiry, advance NPRM, and NPRM) that (1)(i) 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) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA evaluated this rule consistent with Executive Order 13211. FRA determined this rule will not have a significant adverse effect on the supply, distribution, or use of energy and, thus, is not a “significant energy action” under the Executive Order 13211.

List of Subjects in 49 CFR Part 228

Administrative practice and procedures, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons discussed in the preamble, FRA amends part 228 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 228 – PASSENGER TRAIN EMPLOYEE HOURS OF SERVICE; RECORDKEEPING AND REPORTING; SLEEPING QUARTERS

1. The authority citation for part 228 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 21101–21109; Sec. 108, Div. A, Pub. L. 110-432, 122 Stat. 4860–4866, 4893–4894; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 U.S.C. 103; and 49 CFR 1.89.

2. The heading of part 228 is revised to read as set forth above.

3. In § 228.5, add definitions of “Automated recordkeeping system”; “Electronic recordkeeping system”; “Electronic signature”; and “Eligible smaller railroad” in alphabetical order to read as follows:

§ 228.5 Definitions.

* * * * *

Automated recordkeeping system means a recordkeeping system that—

- (1) An eligible smaller railroad, or a contractor or subcontractor to such a railroad, may use instead of a manual recordkeeping system or electronic recordkeeping system to

create and maintain any records subpart B of this part requires; and

(2) Conforms to the requirements of § 228.206.

* * * * *

Electronic recordkeeping system means a recordkeeping system that—

(1) A railroad may use instead of a manual recordkeeping system or automated recordkeeping system to create and maintain any records required by subpart B of this part; and

(2) Conforms to the requirements of §§ 228.201–228.205.

Electronic signature means an electronic sound, symbol, or process that—

(1) Is attached to, or logically associated with, a contract or other record;

(2) Is executed or adopted by a person with the intent to sign the record, to create either an individual's unique digital signature, or unique digitized handwritten signature; and

(3) Complies with the requirements of § 228.19(g) or § 228.206(a).

Eligible smaller railroad means either:

(1) A railroad that reported to FRA that it had less than 400,000 employee hours during the preceding three consecutive calendar years under § 225.21(d) of this chapter on Form FRA 6180.55, Annual Railroad Reports of Employee Hours by State; or

(2) A railroad operating less than 3 consecutive calendar years that reported to FRA that it had less than 400,000 employee hours during the current calendar year under § 225.21(d) of this chapter on Form FRA 6180.55, Annual Railroad Reports of Employee Hours by State.

* * * * *

4. In § 228.9, revise the section heading, add headings to paragraphs (a) and (b), and add new paragraph (c) to read as follows:

§ 228.9 Manual, electronic, and automated records; general.

(a) Manual records. * * *

* * * * *

(b) Electronic records. * * *

* * * * *

(c) Automated records. Each automated record maintained under this part shall be—

(1) Signed electronically by the employee whose time on duty is being recorded or, in the case of a member of a train crew or a signal employee gang, digitally signed by the reporting employee who is a member of the train crew or signal gang whose time is being recorded as provided by § 228.206(a);

(2) Stamped electronically with the certifying employee's electronic signature and the date and time the employee electronically signed the record;

(3) Retained for 2 years in a secured file that prevents alteration after electronic signature;

(4) Accessible by the Administrator through a computer terminal of the railroad; and

(5) Reproducible using printers at the location where records are accessed.

5. In § 228.11, revise the first sentence of paragraph (a) to read as follows:

§228.11 Hours of duty records.

(a) In general. Each railroad, or a contractor or a subcontractor of a railroad, shall keep a record of the hours of duty of each employee. * * *

* * * * *

6. Revise the heading of subpart D to read as follows:

Subpart D—Electronic Recordkeeping System and Automated

Recordkeeping System

7. In § 228.201, revise the section heading, designate the introductory text as paragraph (a), add a heading to newly designated paragraph (a), redesignate paragraphs (1) through (6) as paragraphs (a)(1) through (6), revise the paragraphs newly designated as (a)(1), (a)(3), (a)(4), and (a)(5), and add new paragraph (b) to read as follows:

§ 228.201 Electronic recordkeeping system and automated recordkeeping system; general.

(a) Electronic recordkeeping system. * * *

(1) The system used to generate the electronic record meets all requirements of this paragraph (a) of this section and all requirements of §§ 228.203 and 228.205;

* * * * *

(3) The railroad, or contractor or subcontractor to the railroad, monitors its electronic database of employee hours of duty records through a sufficient number of monitoring indicators to ensure a high degree of accuracy of these records;

(4) The railroad, or contractor or subcontractor to the railroad, trains its affected employees on the proper use of the electronic recordkeeping system to enter the information necessary to create their hours of service record, as required by § 228.207;

(5) The railroad, or contractor or subcontractor to the railroad, maintains an information technology security program adequate to ensure the integrity of the system, including the prevention of unauthorized access to the program logic or individual records; and

* * * * *

(b) Automated recordkeeping system. For purposes of compliance with the recordkeeping requirements of subpart B of this part, an eligible smaller railroad, or a contractor or a subcontractor that provides covered service employees to such a railroad, may create and maintain any of the records required by subpart B using an automated recordkeeping system if all of the following conditions are met:

(1) The automated recordkeeping system meets all requirements of paragraph (b) of this section and all requirements of § 228.206; and

(2) The eligible smaller railroad or its contractor or subcontractor complies with all of the requirements of paragraphs (a)(2) and (a)(4) through (6) of this section for its automated records and automated recordkeeping system.

(c) If a railroad, or a contractor or subcontractor to the railroad, is no longer eligible to use an automated recordkeeping system to record data subpart B of this part requires, the entity must begin keeping manual or electronic records and must retain its automated records as required under § 228.9(c) unless the entity requests, and FRA grants, a waiver under § 211.41 of this chapter.

8. Add § 228.206 to read as follows:

§ 228.206 Requirements for automated records and for automated

recordkeeping systems on eligible smaller railroads, and their contractors or subcontractors that provide covered service employees to such railroads.

(a) Use of electronic signature. Each employee creating a record required by subpart B of this part must sign the record using an electronic signature that meets the following requirements:

(1) The record contains the printed name of the signer and the date and actual time the signature was executed, and the meaning (such as authorship, review, or approval) associated with the signature;

(2) Each electronic signature is unique to one individual and shall not be used by, or assigned to, anyone else;

(3) Before an eligible smaller railroad, or a contractor or subcontractor to such a railroad, establishes, assigns, certifies, or otherwise sanctions an individual's electronic signature, or any element of such electronic signature, the organization shall verify the identity of the individual;

(4) A person using an electronic signature shall, prior to or at the time of each such use, certify to FRA that the person's electronic signature in the system, used on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] is the legally binding equivalent of the person's traditional handwritten signature;

(5) Each employee shall sign the initial certification of his or her electronic signature with a traditional handwritten signature, and each railroad using an automated system shall maintain certification of each electronic signature at its headquarters or the

headquarters of any contractor or subcontractor providing employees who perform covered service to such a railroad, and railroads, contractors, and subcontractors must make the certification available to FRA upon request; and

(6) A person using an electronic signature in such a system shall, upon FRA request, provide additional certification or testimony that a specific electronic signature is the legally binding equivalent of his or her handwritten signature.

(b) System security. Railroads using an automated recordkeeping system must protect the integrity of the system by the use of an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(1) Data input is restricted to the employee or train crew or signal gang whose time is being recorded, except that an eligible smaller railroad, or a contractor or subcontractor to such a railroad, may pre-populate fields of the hours of service record provided that—

(i) The eligible smaller railroad, or its contractor or subcontractor, pre-populates fields of the hours of service record with information the railroad, or its contractor or subcontractor knows is factually accurate for a specific employee.

(ii) The recordkeeping system may allow employees to copy data from one field of a record into another field, where applicable.

(iii) The eligible smaller railroad, or its contractor or subcontractor does not use estimated, historical, or arbitrary information to pre-populate any field of an hours of service record.

(iv) An eligible smaller railroad, or a contractor or a subcontractor to such a railroad, is not in violation of paragraph (b)(1) of this section if it makes a good faith judgment as to the factual accuracy of the data for a specific employee but nevertheless errs in pre-populating a data field.

(v) The employee may make any necessary changes to the data by typing into the field without having to access another screen or obtain clearance from railroad, or contractor or subcontractor to the railroad.

(2) No two individuals have the same electronic signature.

(3) No individual can delete or alter a record after the employee who created the record electronically signs the record.

(4) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record.

(5) Each amendment to a record uniquely identifies the individual making the amendment.

(6) The automated system maintains the records as originally submitted without corruption or loss of data. Beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], an eligible smaller railroad must retain back-up data storage for its automated records for the quarters prescribed in the following table for the time specified in § 228.9(c)(3), to be updated within 30 days of the end of each prescribed quarter—

Quarter 1	January 1 through March 31
Quarter 2	April 1 through June 30
Quarter 3	July 1 through September 30
Quarter 4	October 1 through December 31

(7) Supervisors and crew management officials can access, but cannot delete or alter, the records of any employee after the employee electronically signs the record.

(c) Identification of the individual entering data. If a given record contains data entered by more than one individual, the record must identify each individual who entered specific information within the record and the data the individual entered.

(d) Search capabilities. The automated recordkeeping system must store records using the following criteria so all records matching the selected criteria are retrieved from the same location:

(1) Date (month and year);

(2) Employee name or identification number; and

(3) Electronically signed records containing one or more instances of excess service, including duty tours in excess of 12 hours.

(e) Access to records. An eligible smaller railroad, or contractor or subcontractor providing covered service employees to such a railroad, must provide access to its hours of service records under subpart B that are created and maintained in its automated recordkeeping system to FRA inspectors and State inspectors participating under 49 CFR part 212, subject to the following requirements:

(1) Access to records created and maintained in the automated recordkeeping

system must be obtained as required by § 228.9(c)(4);

(2) An eligible smaller railroad must establish and comply with procedures for providing an FRA inspector or participating State inspector with access to the system upon request and must provide access to the system as soon as possible but not later than 24 hours after a request for access;

(3) Each data field entered by an employee on the input screen must be visible to the FRA inspector or participating State inspector; and

(4) The data fields must be searchable as described in paragraph (d) of this section and must yield access to all records matching the criteria specified in a search.

9. In § 228.207, revise paragraphs (b)(1)(iii)(B) and (c)(1)(i) to read as follows:

§ 228.207 Training.

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(B) The entry of hours of service data, into the electronic system or automated system or on the appropriate paper records used by the railroad or contractor or subcontractor to a railroad for which the employee performs covered service; and

* * * * *

(c) * * *

(1) * * *

(i) Emphasize any relevant changes to the hours of service laws, the recording and reporting requirements in subparts B and D of this part, or the electronic, automated, or manual recordkeeping system of the railroad or contractor or subcontractor to a railroad for which the employee performs covered service since the employee last received training; and

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Issued in Washington, DC.

Ronald Louis Batory,

Administrator.