

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Emergency Order No. 33, Notice No.1]

Emergency Order to Prevent Operation of Trains and Other On-Track Rail Equipment on Blackwell Northern Gateway Railroad

SUMMARY: The Federal Railroad Administration (FRA) of the United States Department of Transportation has determined that public safety compels the issuance of an Emergency Order (Order) requiring the Blackwell Northern Gateway Railroad (BNGR) of Blackwell, Oklahoma, to discontinue operation of all trains, locomotives, and any other on-track rail vehicles or equipment under any circumstances over any track BNGR leases or owns, including the rail line extending from milepost (MP) 0.09 at Wellington, Kansas, to MP 35.35 at Blackwell, Oklahoma, and from MP 127.0 to MP 125.0 at Blackwell until BNGR complies with all requirements of this Order.

FOR FURTHER INFORMATION CONTACT: Christian Holt, Staff Director, Operating Practices Division, Office of Railroad Safety at (202) 366-0978 or Christian.Holt@dot.gov; Elliott Gillooly, Attorney Adviser, Office of the Chief Counsel, at (202) 897-8666 or Elliott.Gillooly@dot.gov; or Veronica Chittim, Attorney Adviser, Office of the Chief Counsel, at (202) 480-3410 or Veronica.Chittim@dot.gov.

SUPPLEMENTARY INFORMATION:

Introduction

As provided below, FRA has determined that public safety compels the issuance of this Order requiring BNGR to discontinue operations of all trains, locomotives, or any other on-track rail vehicles or equipment under any circumstances over any track it leases

or owns, including the rail line extending from MP 0.09 at Wellington, Kansas, to MP 35.35 at Blackwell, Oklahoma, and from MP 127.0 to MP 125.0 at Blackwell until BNGR complies with all requirements of this Order.

Authority

Authority to enforce Federal railroad safety laws has been delegated by the U.S. Secretary of Transportation (Secretary) to the Administrator of FRA. 49 U.S.C. 103; 49 CFR 1.89(e). Railroads are subject to FRA's safety jurisdiction under the Federal railroad safety laws. 49 U.S.C. 20101, 20103. FRA is authorized to issue emergency orders where "an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment." 49 U.S.C. 20104. Emergency orders may immediately impose "restrictions and prohibitions . . . that may be necessary to abate the situation." *Id.*

Background

BNGR operates on approximately 37 miles of rail line owned by the Oklahoma Department of Transportation (ODOT) and the Blackwell Industrial Authority (BIA). The line extends from Blackwell, Oklahoma, to Wellington, Kansas, where BNGR interchanges with BNSF Railway. All track on the BNGR line is designated as "excepted" track, meaning that trains are limited to speeds of 10 miles per hour. BNGR operations on all track is further designated as "yard limits," meaning that crews must be prepared to stop within one half the range of vision at all times when moving trains and engines. BNGR ownership changed on or about October 1, 2023. FRA is aware of several serious incidents that have occurred following the change in BNGR ownership,

including two derailments and a highly dangerous movement of on-track equipment through an unprotected highway-rail grade crossing, narrowly missing a collision with a passenger vehicle.

FRA recently began investigating BNGR's operations following a derailment that occurred on December 27, 2023. FRA has found that BNGR is operating with a complete disregard for the safety of the public and has not taken corrective action to resolve safety issues identified by FRA as posing imminent risks of injury or death. BNGR has, in its short time under current ownership, operated locomotives not safe for use under Federal law (49 U.S.C. 20701, 49 CFR part 229), allowed locomotives to be operated by persons not properly qualified as engineers in accordance with FRA regulations (49 CFR part 240), and failed to qualify any engineers or conductors under any qualification program in accordance with FRA regulations (49 CFR parts 240 and 242, respectively). BNGR has maintained no records of track safety inspections, no records of employees designated and qualified to perform track inspections, and no records that roadway workers have been trained to use roadway maintenance machines or perform safety-essential functions in accordance with FRA regulations (49 CFR parts 213 and 214).

Further, in violation of FRA regulations (49 CFR part 225), BNGR has failed to report, at a minimum, the two derailments that FRA has discovered through its investigation. In both derailments, the individual operating the derailed train was not properly qualified as an engineer in accordance with 49 CFR part 240, including at least one instance when the train's locomotive was also several years past its required periodic inspection (*see* 49 CFR 229.23(a)). Additionally, there is evidence that persons not

employed by the railroad and with no qualification under FRA regulations were allowed to operate locomotives (*see* 49 CFR 240.201(d)). Moreover, there is evidence BNGR employees have been directed by BNGR ownership to provide FRA false information, including a false engineer certification card and false hours of service (HOS) records.

BNGR has created a public safety emergency through a willful failure to undertake basic responsibilities such as track inspection and training for safety-related railroad employees in combination with the deliberate actions of one or more individuals in positions of authority at this railroad. FRA has obtained substantial evidence that the most senior person on location at the BNGR, a co-owner of the railroad, has personally operated locomotives and trains on the BNGR line without the required training or qualification, leading to derailments, and has provided false information to FRA. Evidence also shows this individual has directed employees to act in ways that are unsafe and wholly contrary to a safety culture railroad employees expect and require to do their jobs properly, including directions to put locomotives into service not fit for use and prepare false HOS records. Aggravating all of the foregoing concerns, BNGR has not provided FRA with documentation that the railroad has a written program of operational tests and inspections on its operating rules in accordance with FRA regulations (49 CFR 217.9) or the required training program for its safety-related employees under 49 CFR part 243.

On January 17, 2024, FRA found no program for track inspection in compliance with FRA safety regulations (49 CFR part 213) and no inspection records for any month from the time the BNGR came under current ownership (October through December 2023). Following these findings, BNGR's manager represented to FRA that all track

over which BNGR operates would be taken out of service. Under 49 CFR part 213, any movements on track that is out of service for repairs must be authorized by a § 213.7 qualified person and be made only to facilitate repairs. *See* § 213.233(d).

On Sunday, January 28, 2024, witnesses reported that at approximately 5:15 p.m., C.S.T., an on-track hi-rail vehicle¹ nearly collided with a highway passenger vehicle at a highway-rail grade crossing at Doolin Avenue over the BNGR line near Blackwell, Oklahoma. This incident demonstrates a cascade of failures to protect life and safety by BNGR, as the grade crossing signal system at the highway-rail grade crossing was not activated, no flag protection of the intersection was provided, and the hi-rail vehicle reportedly made no effort to stop and yield the right-of-way to vehicular traffic at the crossing, which is a customary railroad safety practice and often part of a railroad's operating rules under 49 CFR part 217.

Finding and Order

The evidence developed in FRA's investigation of the BNGR has led FRA to conclude that continued operation of any rail equipment by BNGR on any part of its line poses an imminent threat to safety, including the threat of serious harm to persons employed by BNGR and the public. Further, the pattern of gross negligence and willful failures to comply with Federal safety regulations in multiple functional areas, including track safety, locomotive engineer qualification and certification, operating practices, and roadway worker safety, persuades FRA that reliance alone upon the assurances and cooperation of BNGR is not possible, consistent with public safety. Therefore, as the

¹ A hi-rail vehicle is a roadway maintenance machine that is manufactured to meet Federal Motor Vehicle Safety Standards and is equipped with retractable flanged wheels so that the vehicle may travel over the highway or on railroad tracks. *See* 49 CFR 214.5.

Administrator of FRA, I find that the combination of unsafe conditions and practices discussed above creates an emergency situation involving a hazard of death or injury to persons.

Accordingly, pursuant to the authority of 49 U.S.C. 20104, delegated to me by the Secretary, it is ordered that BNGR must discontinue, and may not permit under any circumstances, the operations of trains, locomotives, or any other on-track rail vehicles or equipment on any part of the track that it owns or leases from ODOT or the BIA, including all track between Wellington, Kansas, and Blackwell, Oklahoma, while this Order remains in effect. I direct that a copy of this Order be posted in a public location at the railroad's office and a copy of the Order be provided to each employee of the railroad within 24 hours of the date of issuance.

FRA investigation of this railroad is ongoing, and FRA may take further steps to assure public safety. These steps may include additional notice(s) under this Order and/or other enforcement action.

Relief

BNGR may only resume operations and obtain full relief from this Order by taking the following actions:

1. Submit to FRA for approval both a current, written program for certifying the qualification of engineers under 49 CFR part 240 and a current, written program for certifying the qualification of conductors under 49 CFR part 242. *See* 49 CFR 240.101; 49 CFR 242.101.

2. Submit to FRA for approval a list of conductors and engineers who have been certified under the written programs approved by FRA, with complete, written

certification determinations for each individual as required under 49 CFR 240.109 for engineers, and 49 CFR 242.109 for conductors.

3. Submit to FRA for approval a written program of operational tests and inspections to be put in effect in accordance with 49 CFR 217.9.

4. Submit to FRA for approval a training program in compliance with 49 CFR part 243 for training, qualification, and oversight of safety-related railroad employees.

5. Submit to FRA for approval an on-track safety program that complies with the requirements of 49 CFR part 214, subpart C, and complete training and qualification records in accordance with that program for all employees who will engage in any on-track work or use of roadway maintenance machines.

6. Submit to FRA a list of designated, qualified persons responsible for maintenance and inspection of track in accordance with 49 CFR 213.7.

7. Accompany FRA track inspectors on a joint inspection of all BNGR track.

8. Complete all remedial actions noted by FRA for track defects identified following the joint inspection and submit records of all required track inspections after the completion of all remedial action.

9. Certify to FRA that a self-audit of HOS records has been completed and submit to FRA any records found to be incorrect or substantially incomplete with corrections to those records, to the extent possible.

10. Certify to FRA that all employees have been trained on HOS requirements under 49 CFR part 228; 49 U.S.C. ch. 211.

11. Certify to FRA that all employees have been trained on the requirements under 49 CFR part 225 to report accidents and incidents to FRA.

12. Submit to FRA all records of inspections required to be maintained under § 234.109 (system malfunction at highway-rail grade crossings).

13. Certify that all locomotives are in proper condition and fit for service in accordance with 49 U.S.C. ch. 207 and 49 CFR part 229.

14. Obtain approval from the FRA Administrator that all requirements of this Order have been met and properly performed.

To obtain relief, BNGR must take the actions described above and submit all required information and certifications to Christian.Holt@dot.gov and subsequently inform the FRA Administrator in writing that it believes all of the requirements of this Order have been met. FRA will conduct verification inspections and will inform BNGR in writing whether it is in compliance with this Order so that the Order may be lifted. If FRA does not lift the Order, FRA's written response will specifically describe what additional measures need to be taken to meet all of the requirements of this Order.

Partial Relief

For FRA to consider granting partial relief from this Order, BNGR must submit a written plan for approval to Christian.Holt@dot.gov that provides a detailed explanation of the partial relief sought, the specific measures that BNGR proposes to ensure the safety of any operations to be permitted, and the period of time for which such partial relief is sought.

Any partial relief provided will remain subject to BNGR's compliance with its approved written plan to provide safety measures, limitations on operations, and time periods for each component part of the partial relief. Failure to comply with any material provision of the approved plan will result in the partial relief being revoked.

Penalties

Any violation of this Order or the terms of any approved written plan pursuant to this Order subjects the person (railroad carrier) committing the violation to a civil penalty of up to \$35,516 for ordinary violations and \$142,063 for aggravated violations for each day the violation continues. 49 U.S.C. 21301; 88 FR 89551 (Dec. 28, 2023). Any individual (railroad personnel) who willfully violates a provision stated in this Order is subject to civil penalties under 49 U.S.C. 21301. In addition, such an individual (railroad personnel) whose violation of this Order demonstrates the individual's unfitness for safety-sensitive service may be removed from safety-sensitive service on the railroad under 49 U.S.C. 20111.

If appropriate, FRA may pursue criminal penalties under 49 U.S.C. 522(a) and 49 U.S.C. 21311(a), as well as 18 U.S.C. 1001, for the knowing and willful falsification of a report required by this Order. FRA may, through the Attorney General, also seek injunctive relief to enforce this Order. 49 U.S.C. 20112.

Effective Date and Notice to Affected Persons

This Order takes effect at 12:01 a.m., C.S.T., on February 3, 2024, and applies to operations of all trains, locomotives, and any other on-track rail vehicles or equipment. Notice of this Order will be provided by publishing it in the *Federal Register*. Copies of this Order will be sent by e-mail prior to publication to BNGR, ODOT, and BIA.

Review

Opportunity for formal review of this Order will be provided in accordance with 49 U.S.C. 20104(b) and 5 U.S.C. 554. Administrative procedures governing such review are found at 49 CFR part 211. See 49 CFR 211.47, 211.71, 211.73, 211.75, and 211.77.

Issued in Washington, DC, on February 2, 2024.

Amitabha Bose,
Administrator.