



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

February 8, 2019

Brotherhood of Maintenance of Way Employes Division/IBT  
c/o Richard S. Edelman (via email to: REdelman@mooneygreen.com)  
Mooney, Green, Saindon, Murphy & Welch, P.C.  
1920 L Street NW, Suite 400  
Washington, DC 20036

John Cech (via email to: John.Cech@bnsf.com)  
Vice President, Engineering  
BNSF Railway Company  
2600 Lou Menk Drive  
Fort Worth, TX 76131

Michael J. Rush (via email to: mrush@aar.org)  
Senior Vice President  
Safety and Operations  
Association of American Railroads  
425 3<sup>rd</sup> Street SW, Suite 1000  
Washington, DC 20024

RE: Notice Seeking Comments on Administrative Stay of Decision Approving BNSF  
Railway's Test Program to Evaluate Automated Track Inspection Technologies (Docket No.  
FRA-2018-0091)

Dear Mr. Edelman, Mr. Cech, and Mr. Rush:

As you are aware, the Brotherhood of Maintenance of Way Employes Division/IBT (BMWED) is seeking judicial review of the Federal Railroad Administration's (FRA) approval of BNSF Railway Company's (BNSF) Test Program to evaluate automated track inspection technologies and the temporary suspension of 49 C.F.R. § 213.233(c) as necessary to carry out the Test Program. *Brotherhood of Maintenance of Way Employes/IBT v. United States Department of Transportation and Federal Railroad Administration*, No. 18-1331 (D.C. Cir.).<sup>1</sup> Due to the possible lapse of funding for FRA's operations, as well as the pending litigation and Petition for Reconsideration, on December 14, 2018, FRA decided to stay the beginning of Phase 2 of the Test Program until February 1, 2019. See Letter from Thomas Herrmann,

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<sup>1</sup> BMWED originally filed a Complaint in District Court on November 30, 2018, but voluntarily withdrew its Complaint. See *BMWED v. FRA*, No. 18-2790 (D.D.C.).

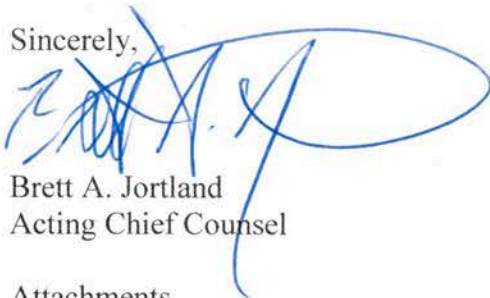
Director, Office of Technical Oversight, FRA, to John Cech, Vice President, Engineering, BNSF (Dec. 14, 2018), attached as Exhibit 1.

On December 20, 2018, two days before the government shutdown, BMWED (jointly with the Brotherhood of Railroad Signalmen) filed a petition for stay with FRA. Most of FRA's employees were furloughed during the lapse in funding, which continued longer than expected. In order to preserve the status quo during the government shutdown, before considering the merits of either the Petition for Reconsideration or BMWED's pending litigation, on January 25, 2019, FRA further stayed the beginning of Phase 2 of the Test Program until August 1, 2019. *See* Letter from Karl Alexy, Deputy Associate Administrator for Railroad Safety, FRA, to John Cech, Vice President, Engineering, BNSF (Jan. 25, 2019), attached as Exhibit 2; *see also* Letter from Brett Jortland, Acting Chief Counsel, to Richard Edelman, counsel for Brotherhood of Maintenance of Way Employees Division/IBT (Jan. 25, 2019), attached as Exhibit 3.

On January 30, 2019, FRA received a letter from the Association of American Railroads, requesting the January 25, 2019, stay to be lifted since the government shutdown had ended. *See* Letter from Michael Rush, Senior Vice President, Association of American Railroads (AAR), to Ronald Batory, Administrator, FRA (Jan. 30, 2019), attached as Exhibit 4. In light of AAR's request and FRA's recently issued decision on BMWED's Petition for Reconsideration, FRA seeks the views of the parties involved in the Petition for Reconsideration and the litigation as to whether there is any reason to continue to stay BNSF's entry into Phase 2 of its Test Program. Therefore, FRA requests that the parties submit to FRA by February 20, 2019, their views on whether the stay should be maintained, modified or rescinded. Any views should be submitted to Docket FRA-2018-0091 on regulations.gov.

FRA will publicly post this notice and any comments received in response to this notice to the regulations.gov docket as soon as possible.

Sincerely,



Brett A. Jortland  
Acting Chief Counsel

Attachments

# Exhibit 1



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

DEC 14 2018

John Cech  
Vice President, Engineering  
BNSF Railway Company  
2600 Lou Menk Drive  
Fort Worth, TX 76131

RE: BNSF Railway's Test Program to Evaluate Automated Track Inspection  
Technologies (Docket No. FRA-2018-0091)

Dear Mr. Cech:

Per discussions with BNSF Railway, this letter is to confirm that Phase 1 of the Test Program approved by the Federal Railroad Administration on September 26, 2018, and modified on October 24, 2018, is hereby extended through January 31, 2019. Phase 2 may not commence prior to February 1, 2019.

If you have any questions, please contact Dr. Yu-Jiang Zhang, FRA Staff Director, Track Division at (202) 493-6460 or [yujiang.zhang@dot.gov](mailto:yujiang.zhang@dot.gov).

Sincerely,

A handwritten signature in dark ink, appearing to read "Thomas Herrmann", with a long horizontal line extending to the right.

Thomas Herrmann  
Director, Office of Technical Oversight  
Office of Railroad Safety

# Exhibit 2



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

January 25, 2019

John Cech  
Vice President, Engineering  
BNSF Railway Company  
2600 Lou Menk Drive  
Fort Worth, TX 76131

RE: BNSF Railway's Test Program to Evaluate Automated Track Inspection Technologies  
(Docket No. FRA-2018-0091)

Dear Mr. Cech:

As you are aware, the Federal Railroad Administration (FRA) is currently in litigation with the Brotherhood of Maintenance of Way Employees Division/IBT (BMWED), in the U.S. Court of Appeals for the D.C. Circuit, over the approval of BNSF Railway's (BNSF) Test Program to Evaluate Automated Track Inspection Technologies. On December 20, 2018, two days before the government shutdown, BMWED filed a petition for a stay with FRA. Then, on January 22, BMWED filed a Petition for Stay in the pending D.C. Circuit litigation.

Because most of FRA's employees have been furloughed since December 22, due to the lapse in funding for the federal government, FRA is not able to consider the merits of BMWED's stay requests. To preserve the status quo during the government shutdown, FRA is granting BMWED's request for an administrative stay and is delaying the beginning of Phase 2 of the Test Program to August 1, 2019. FRA hopes that this extension will also allow ample time to resolve the pending litigation in this matter.

Therefore, as discussed with BNSF, this letter confirms that Phase 1 of the Test Program approved by FRA on September 26, 2018, and modified on October 24, 2018, is hereby extended through July 31, 2019. Phase 2 may now not commence prior to August 1, 2019.

If you have any questions, please contact Dr. Yu-Jiang Zhang, FRA Staff Director, Track Division at (202) 493-6460 or [yujiang.zhang@dot.gov](mailto:yujiang.zhang@dot.gov).

Sincerely,

J. Karl Alexy  
Deputy Associate Administrator for Railroad Safety

# Exhibit 3



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

January 25, 2019

Brotherhood of Maintenance of Way Employees Division/IBT  
c/o Richard S. Edelman  
Mooney, Green, Saindon, Murphy & Welch, P.C.  
1920 L Street NW, Suite 400  
Washington, DC 20036

RE: Response to Request for Stay of Decision Approving BNSF Railway's Test Program to  
Evaluate Automated Track Inspection Technologies (Docket No. FRA-2018-0091)

Dear Mr. Edelman:

The Federal Railroad Administration (FRA) has received the stay request you submitted on behalf of the Brotherhood of Maintenance of Way Employees Division/IBT. Because most of FRA's employees have been furloughed due to the lapse in funding for the federal government, FRA is not able to consider the merits of your stay request. However, to preserve the status quo during the government shutdown, FRA is granting your request for a stay and is extending the beginning of Phase 2 of BNSF Railway's Test Program until August 1, 2019, as is noted in the attached letter. FRA hopes that this extension will also allow ample time to resolve the pending litigation in this matter. We will publicly post these letters to the docket for this proceeding on [regulations.gov](http://regulations.gov) as soon as practicable.

Sincerely,



Brett A. Jortland  
Acting Chief Counsel

Attachment



# Exhibit 4



ASSOCIATION OF  
AMERICAN RAILROADS

**Michael J. Rush**  
Senior Vice President  
Safety and Operations

January 30, 2019

Ronald Batory, Administrator  
U.S. Department of Transportation  
Federal Railroad Administration  
1200 New Jersey Ave, S.E.  
Washington, DC 20590

***Via electronic mail***

**Re: The Stay of BNSF Railway's Test Program to Evaluate Automated Track Inspection Technologies (Docket No. FRA-2018-0091)**

Dear Administrator Batory:

AAR understands that on January 25, FRA granted the December 20 "Petition for Stay of Decision" filed by BMWED in the docket in the above-referenced proceeding. The stated justification for granting the stay was to "preserve the status quo during the government shutdown," but the start of Phase II of the Test Program was delayed for six months.

In the letter to BMWED announcing the stay, FRA made it clear that the stay was not being granted based on any arguments made by BMWED regarding the safety of the approved test program; indeed, FRA stated that expressly that FRA was "*not able to consider the merits of [BMWED's] stay request.*" Instead, the stay purportedly was granted to "preserve the status quo during the shutdown."

That being the sole basis for FRA's decision, the stay should be lifted immediately, as the government has now re-opened. At most, to preserve the *status quo ante* positions of BMWED and DOT, the start date for Phase II could be tolled for the duration of the shutdown – which amounted to 35 days. Any delay beyond that that is inconsistent with FRA's stated reason for granting the stay, but more importantly, will seriously prejudice the BNSF program, and its important objectives.

As explained in AAR's Motion to Intervene in the lawsuit filed by BMWED against DOT over the FRA's approval of the test program, this program is of great importance to the entire rail industry, not just to BNSF. The program as approved is a model for efficient and effective test

January 30, 2019

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trials of innovations in safety. This is exactly the type of program that incentivizes (and can accelerate) the development, testing, and deployment of new safety innovations and technologies. Other railroads – at your urging – are in the process of developing similar test programs. FRA's sudden decision – made when the agency was officially closed for business, and purportedly based solely on that closed status -- to suspend this program for six months is arbitrary and groundless. We hope that you will reconsider imposing this setback on the industry and its efforts to continuously innovate safer and more efficient ways to operate.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Rush". The signature is written in a cursive, flowing style.

Michael J. Rush

cc: Brett Jortland, Acting FRA Chief Counsel