



ASSOCIATION OF AMERICAN RAILROADS
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Office of the Federal Register
800 North Capitol Street NW
Suite 700
Washington, D.C. 20001

Re: **NARA 12-0002; Incorporation by Reference; Announcement of a petition for rulemaking and request for comments**

Enclosed please find the comments of the Association of American Railroads in the above-referenced proceeding.

Sincerely,

Daniel Saphire

Encl.

BEFORE THE
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OFFICE OF THE FEDERAL REGISTER

DOCKET NO. NARA-12-0002
INCORPORATION BY REFERENCE

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR) submits the following comments in response to Office of the Federal Register's announcement of a petition for a rulemaking and request for public comments on approval of agency requests to incorporate material by reference into the code of federal regulations. AAR is a trade association representing the North American railroad industry. AAR's members include freight railroads that operate 77 percent of the line-haul mileage, employ 94 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States, as well as passenger railroads that operate intercity trains and provide commuter service. In addition to representing its members on legislative and regulatory matters, AAR undertakes a significant amount of standard setting for the railroad industry. As some of AAR's standards have been incorporated by reference into the federal register and code of federal regulations, AAR has a direct interest in this proceeding.

Standards play an essential role in the railroad industry. The national rail network consists of over five hundred railroads operating over nearly 140,000 miles of track,

utilizing over 1.3 million freight cars—which are owned by both railroads and non-railroad companies—and nearly 24,000 locomotives. Cars and locomotives are freely, and continuously, interchanged between the lines of different railroads; railroads have a legal obligation to interchange traffic, but as a practical matter the system could not operate with any degree of efficiency if free interchange did not occur. Because interchange of equipment is necessary, it is essential that the railroads operating on the rail network can be confident that the rail cars coming onto their lines—many of which they do not own—meet standards of interoperability and can be safely operated. Consequently, the standards developed and published by AAR primarily address safety and interoperability. AAR facilitates an interchange agreement among virtually all railroads and car owners under which they agree to abide by the AAR's interchange rules and standards.

AAR, including its predecessor organizations, has been developing industry standards for well over a century. Standards are developed by industry committees with jurisdiction over discrete issues, composed of railroad employees with expertise in the relevant areas; representatives of rail component manufacturers and suppliers work with the committees to provide additional expert input. AAR standards address a host of railroad components, systems and technologies; for example, AAR standards cover brake systems, car construction, wheels, axles, castings, couplers, railway electronic systems, specialized cars, such as tank cars (which, because of the hazardous nature of some of the products they ship, pose unique issues), and lettering and marking of cars, to name a few. Typically, new standards are developed, or existing standards modified, in response changes or improvement in technology, or to meet new issues or

changing operating environments that face the industry; private standards often can respond to technological and other changes faster than federal regulations. AAR rules and standards are published in two manuals, the Office and Field Manuals of the AAR Interchange Rules, and in a multi-volume Manual of Standards and Recommended Practices (MSRP). Although hard copies of these materials are still published, these documents are also available electronically.

AAR sells its rules and standards to the general public, mostly to parties whose activities or equipment are covered by all or part of the rules and standards. Generally, different volumes of the MSRP may be purchased on an individual basis so that a party need only purchase the standards that are relevant to its use. Charges for AAR standards are designed to recoup standards development costs. This includes the costs associated with the production, arrangement, administration and printing of the standards, including frequent updates. It also includes the staff who support the standard setting process by working with the various committees, providing both technical (locomotive, railcar and component operation, testing and/or engineering analysis, as needed) and administrative assistance. AAR relies on the revenues obtained through sales of its standards to fund these activities.

AAR's standards complement the regulatory efforts of the federal government; in many ways, they complement each other. The Department of Transportation, primarily through the Federal Railroad Administration (FRA), is responsible for regulating railroad safety. Many AAR standards address items that are not covered by FRA regulations; some AAR standards reference FRA regulations; and in a number of cases FRA

regulations incorporate AAR standards by reference.¹ In addition, the Pipeline and Hazardous Materials Safety Administration incorporates AAR standards by reference.² Thus, a number of AAR standards would be affected by any modification to the rules governing incorporation by reference.

The Director of the Federal Register has authority to approve material for incorporation by reference in the Federal Register. One of the criteria for such approval is that the material be “reasonably available to . . . the class of persons affected by the publication.” 1 C.F.R. 51.7(a)(4). The key issue presented by the petition is whether “reasonably available” means private standards which an agency proposes to incorporate by reference into federal regulations should be made available free and online to interested parties. AAR does not take issue with the petitioner’s assertion that parties who have an interest in a proposed federal regulation should have access without charge to material the agency proposes to incorporate by reference into a regulation, in addition to material that has been incorporated into final federal rules and has the force of binding law. At the same time, the petitioners also properly acknowledge that promulgating standards requires an investment of effort and resources, and that protecting the interests of the copyright holder of the standards also

¹ See e.g., 49 C.F.R. 229.217 **Fuel Tank**, incorporating AAR Standard S-5506 “Performance Requirements for Diesel Electric Locomotive Fuel Tanks;” 49 C.F.R. 232.103(l) **General requirements for all train brake systems**, incorporating AAR standard S-469-47, “Performance Specification for Freight Brakes;” 49 C.F.R. 232.305 **Single car air brake tests**, incorporating AAR Standard S-486-04 “Code of Air brake System Tests for Freight Equipment;” 49 C.F.R. 232.603 **Design, interoperability, and configuration management requirements**, incorporating AAR Manual of Standards and Recommended Practices related to ECP brake systems.

² See e.g., 49 C.F.R. Part 179 **Specifications for Tank Cars**, incorporating AAR M-1002, Specification for Tank Cars, Manual of Standards and Recommended Practices, Section C-Part III.

must be taken into consideration. Like AAR, many standard-setting organizations charge for their standards as a means of recouping the various costs of standards developing and would likely lose that revenue if required to make their standards readily available at no charge.

AAR would support defining “reasonably available” as free and online, so long as the legitimate concerns of standard-setting organizations about revenue loss were addressed. Generally, access should be limited to what is necessary to enable interested parties to comment on agency proposals and comply with their legal obligations; it should not serve as a substitute for purchases of standards that a party would make in the ordinary course. At minimum, any requirement to make standards available on the internet free of charge should acknowledge the right of a standard-setting organization to make its material available in the most restrictive way that still enables interest parties to gain access for the purpose of preparing comments on the agency’s proposal or understanding their obligations under federal law. For example, as petitioners suggest, standard setting organizations should be permitted to make any material an agency proposes to incorporate by reference available on the internet in a read-only format and only during the time period in which the agency is accepting comments on the proposal. So long as interested parties would not be able to copy or print the material, it would seem likely that the market for the standards would not be substantially affected.³

³ Because most members of the railroad industry have agreed to be bound by some or all of AAR’s standards (not just those which are incorporated into federal regulations), they likely would have an interest in purchasing AAR’s standards notwithstanding limited free internet access.

On the other hand, if incorporation by reference requires access which serves as a viable substitute for the purchase of standards that a party otherwise would have made, some steps should be taken to mitigate the revenue loss to standard-setting organizations. For example, it may be appropriate to permit the affected standard setting organization to seek some payment, in the form of a licensing fee, from the agency proposing to utilize the standard. As the petition suggests, to the extent that agency decisions to incorporate private standards into regulations results in a loss of revenue to a standard setting organization, the agency ought to be amenable to compensating the organization. 77 FED. REG. 11416.

There may be other methods of minimizing revenue loss to standard-setting organizations. Concern over access to standards has focused on small businesses and individuals, as they rightly should since those are the entities that are least likely to be able to afford to pay for access. On the other hand, in many cases the entities that would have an interest in gaining access to standards proposed for incorporation by reference are businesses with financial wherewithal, which, in many cases, may already purchase the standards for their own purposes, independent of any agency action. With respect to AAR's standards most of the parties that might be covered by federal regulations which incorporate some AAR standards have already independently agreed to abide by AAR's standards through the AAR interchange agreement. Requiring that standard-setting organizations permit free internet access to such entities may not be necessary to "assure Americans [] ready access to the laws that controls their conduct." See Petition 77 FED. REG. 11415. To the extent feasible, the Office of the Federal Register should consider permitting agencies to limit free internet access only to parties

that would suffer an undue burden if they were required to pay the going rate for private standards.