EXHIBIT 3-O

Docket No. DCA-08-MR009

NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594

Brotherhood of Locomotive Engineers and Trainmen and United Transportation Union Joint Petition for Review of Emergency Order 26

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VIA ELECTRONIC MAIL

November 14, 2008

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Office of Chief Counsel
Federal Railroad Administration
1200 New Jersey Avenue, SE
RCC–12, Mail Stop 10
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Re: FRA Emergency Order No. 26

Dear Ms. Landis:

As provided for in Section 211.47 of Title 49 of the Code of Federal Regulations, this will serve as a Petition for Review of the above-referenced Emergency Order ("EO 26"), which was published by the Federal Railroad Administration ("FRA") over the signature of Administrator Joseph H. Boardman on October 7, 2008. *See* 73 Fed. Reg. 58702–58708. This Petition is filed jointly by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"), and by the United Transportation Union ("UTU") (hereinafter "Petitioners"). Together, Petitioners are the duly designated and recognized collective bargaining representatives for nearly all train employees — as that term is defined in 49 U.S.C. Section 21101(5) — on all Class I railroads. Petitioners also represent train and other employees on numerous Class II and Class III railroads. Consequently, a significant proportion of BLET and UTU members are impacted by EO 26.

At the outset, we wish to reaffirm our support for FRA's promulgating and publishing the Emergency Order. Our representatives on the Railroad Operating Rules Working Group of the Railroad Safety Advisory Committee have worked closely with FRA for a year on developing appropriate controls governing the use of mobile electronic devices by train employees. We are

pleased that EO 26 reflects the consensus values of the Working Group and we are confident that safety is demonstrably enhanced because of FRA's action.

That being said, our internal discussions following publication of EO 26 raised some issues that were neither considered by the Working Group, nor, apparently, by FRA in developing EO 26. Each involves a relatively infrequent situation, but one in which strict application of EO 26 either is unnecessary or is less safe than a carefully crafted exception. We will present each of these issues, state our understanding of EO 26 with regard to the issue, identify a problem we have found, and then propose a solution.

Use of cell phones while deadheading.

We do not read EO 26 as distinguishing between train employees who are working and on duty, and those who are deadheading, whether while on duty or during periods of "limbo" time. Indeed, we believe that the safety considerations addressed by most restrictions on the use of devices applicable when (1) operating a moving train, (2) while on a moving train, (3) while on the ground, and (4) while another railroad employee is assisting in the preparation of the train, are critical.

However, EO 26 makes no distinction between the cab of the lead locomotive in a consist and cabs of trailing locomotives. We would agree that restricting the use of a mobile phone by a deadheading crew member in the lead locomotive while a train is moving poses a similar potential for distraction as use by a working crew member and, therefore, such use should be subject to the same restrictions as apply to crew members other than the locomotive engineer (e.g., limited to authorized business purposes, after a safety briefing, and with the concurrence of the crew).

Section (d)(3) of EO 26 provides that a "railroad operating employee may use a railroad-supplied electronic or electrical device for an approved business purpose while on duty within the body of a passenger train or railroad business car." 73 Fed. Reg. 58707. This standard is less restrictive than the one that applies in the locomotive cab, and properly so, because use under these conditions should not distract the locomotive engineer. We believe that a crew deadheading should be permitted a corresponding degree of latitude, which can be achieved by treating locomotive cabs on trailing units as passenger or railroad business cars are treated.

Moreover, since deadheading crews have fulfilled their safety-related responsibilities — and in many cases are not on duty — they should not be restricted to "business purpose use" only. Accordingly, we propose that Section (f) of EO 26, entitled "Exceptions," be revised by adding at the end a paragraph reading as follows:

A railroad operating employee who is deadheading may use a cell phone while within the body of a passenger train or railroad business car, or while inside the cab of a locomotive that is not the lead locomotive of the train on which the employee is deadheading.

Use of cameras.

We read Section (b)(2) of EO 26 as including still and video electronic cameras. Furthermore, we read Section (c)(3) — prohibiting the use of a personal electronic or electrical device to perform any function other than voice communication while on duty — to cover the photographic function of cell phones that are so equipped. At the same time, however, it appears to us that other types of cameras, particularly the mechanical cameras of yesteryear, are not covered by EO 26.

We do not suggest that it would be appropriate to broaden the scope of EO 26 to include mechanical cameras. Nor do we contend that FRA should remove restrictions on all cameras for the sake of regulatory consistency. However, EO 26, as published, appears to forbid photographic documentation by a train employee of a safety hazard or a violation of a rail safety law, regulation, order or standard, which would actually diminish railroad safety.

We concede that this concern may be impliedly addressed by the portion of Section (b)(7) of EO 26 that defines the use of an electronic or electrical device as including "perform[ing] any other function that is not necessary for the health or safety of the person." 73 Fed. Reg. 58707. If FRA determines that photographically documenting a safety hazard or violation is permissible because it pertains to the health or safety of the train employee, an interpretation to that effect would satisfactorily address our concern. In the alternative, we propose that Section (f) of EO 26, entitled "Exceptions," be revised by adding at the end a paragraph reading as follows:

An electronic still or video camera may be used to document a safety hazard or a violation of a rail safety law, regulation, order or standard; provided, that (1) the use of a camera in the cab of a moving train may only be by a crew member other than the locomotive engineer, and (2) the use of a camera by a train employee on the ground is permissible only when (a) the employee is not fouling a track, (b) no switching operation is underway, (c) no other safety duties are presently required, and (d) all members of the crew have been briefed that operations are suspended. The use of the photographic function of a cell phone is permitted under these same conditions.

Use of calculators.

Section (b)(7) of EO 26 includes executing a "computational function" in the definition of use of an electronic or electrical device. Id. Moreover, Section (c)(3) states that the use of a personal electronic or electrical device to perform any function other than voice communication while on duty is prohibited. Id. EO 26 also includes an exception at Section (f)(5), whereby a railroad

employee may refer to a digital timepiece to ascertain the time of day or to verify the accuracy of speed indicators. 73 Fed. Reg. 58708.

While we generally support restrictions upon performing computational functions with electronic devices, it has come to our attention that a number of safety-critical computational functions may be required in numerous circumstances when on-board systems fail or are not provided. These include managing correct horsepower per ton, calculating tons per operative brake, dynamic brake and tractive effort compliance, and correcting train length for speed restrictions and clearing track authorities.

We strongly believe that requiring manual calculations in these circumstances — as a crew would be required to do because of EO 26 — actually is less safe than permitting the use of calculators because (1) manual calculations take longer and, thus, are more distracting, and (2) the potential for error in the calculation is far higher for manual calculations than for electronic calculations. Accordingly, we propose that Section (f) of EO 26, entitled "Exceptions," be revised by adding at the end a paragraph reading as follows:

> When mathematical calculations are required for safe train movement (e.g., managing correct horsepower per ton, calculating tons per operative brake, dynamic brake and tractive effort compliance, and correcting train length), it is permissible to perform such calculations by using an electronic calculator, or by using the calculator function of a a cell phone or electronic timepiece.

Use of Global Positioning Satellite ("GPS") technology.

Although EO 26 does not specifically mention GPS trackers, such devices clearly are electronic devices, and appear to fall within the definition of use because they perform computational functions. We have been advised that locomotive engineers occasionally rely upon GPS trackers in order to verify the accuracy of speed indicators, particularly when the designated measured mile lies within a temporary speed restriction of less than 30 miles per hour.

Current FRA regulations specify three standards for speed indicators in controlling locomotives:

- no speed indicator is required so long as the train speed does not exceed 20 mph;
- speed indicators must be accurate to within ± 3 mph at speeds of 10 mph to 30 mph; and
- speed indicators must be accurate to within ± 5 mph at speeds above 30 mph.

49 CFR § 229.117(a).

One effect of EO 26 is to preclude the use of a GPS device to calculate the speed of a train that is not equipped with a speed indicator because the train will not exceed 20 mph. Another is that

the accuracy of a speed indicator determined within a slow order of 30 mph or less cannot be correlated with its accuracy at speeds above 30 mph. Maintaining proper train speed is both safety-critical and demanded of a locomotive engineer. *See* 49 CFR § 240.305(a)(2).

FRA mandates that "[e]ach speed indicator required shall be tested as soon as possible after departure by means of speed test sections or equivalent procedures." 49 CFR § 229.117(b). In our view, the use of a GPS tracking device prior to promulgation of EO 26 was a satisfactory equivalent procedure, and continued use under these circumstances should be permitted. We believe it is appropriate that Section (f) of EO 26, entitled "Exceptions," be revised by adding at the end a paragraph reading as follows:

A Global Positioning Satellite (GPS) tracking device may be used in order to verify the accuracy of the speed indicator in a controlling locomotive.

It is not our intention to unnecessarily complicate a fairly bright-line rule regarding the use of electronic and electrical devices. However, we do believe FRA should seriously consider those atypical situations in which EO 26 as currently written could inadvertently result in a diminution of safety, as compared to operating conditions and practices in effect prior to its promulgation.

Respectfully submitted,

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BLET National President

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cc: The Honorable Joseph H. Boardman, Federal Railroad Administrator
Jo Strang, FRA Associate Administrator for Safety
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