

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1048**September Term, 2019**

FILED ON: OCTOBER 11, 2019

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT,
PETITIONER

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL RAILROAD ADMINISTRATION,
RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS,
INTERVENOR

On Petition for Review of a Decision of the
Federal Railroad Administration

Before: PILLARD and RAO, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This appeal from a decision of the Federal Railroad Administration (“FRA”) was presented to the court and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

ORDERED and **ADJUDGED** that the petition for review be denied.

In order to conduct a test of automated track inspection technologies and methodologies, BNSF Railway submitted a proposed Test Program and petition to FRA to suspend several track safety standards. After a lengthy back and forth, FRA approved BNSF’s Test Program and temporarily suspended 49 C.F.R. § 213.233(c), which mandates the minimum frequency of manual visual track inspections. The Brotherhood of Maintenance of Way Employees Division/International Brotherhood of Teamsters (the “Union”) challenges FRA’s temporary suspension of this track safety standard.

FRA has authority to “temporarily suspend compliance with a substantive rule” if suspension “is necessary to the conduct of a . . . test program,” “is limited in scope and application to such relief as may be necessary to facilitate the conduct of the test program,” and “is conditioned

on the observance of standards sufficient to assure safety.” 49 C.F.R. § 211.51 (“suspension regulation”). FRA approved the proposed Test Program by sending BNSF an Approval Letter setting out the Test Program’s parameters and publishing a notice in the Federal Register explaining its decision to temporarily suspend § 213.233(c). *See* Letter from Ronald Batory, Administrator, FRA, to John Cech, Vice President of Engineering, BNSF (Sept. 26, 2018) (“Approval Letter”); 83 Fed. Reg. 55,449 (Nov. 5, 2018) (“Notice”). In the Notice, FRA described the Test Program, which takes place over four phases. In each phase, automated track inspection technologies and targeted manual track inspection methods are introduced while the frequency of current manual track inspections is reduced. BNSF must meet increasingly stringent safety benchmarks at each phase of the Program in order to advance to the next. The purpose of the Test Program is to “test the use of manned and unmanned track geometry cars for track inspection as a viable alternative to manual visual inspections and to implement and test an optical visual platform to supplement manual visual inspections.” 83 Fed. Reg. at 55,449. The agency explained that the limited and temporary suspension of the manual inspection requirements was necessary to the Test Program because the Program “is specifically designed to evaluate the effectiveness of various types of automated track inspection technologies.” *Id.* at 55,450. FRA imposed on BNSF safety precautions and reporting requirements as a condition of approving the Test Program and reserved FRA’s right to require BNSF to revise the Program if it fails to meet the Test Program’s safety metrics. *See id.*

After FRA published the Notice, the Union filed a petition for reconsideration with the agency arguing that FRA failed to comply with the suspension regulation. In denying the petition, FRA expanded on the necessity and safety rationale of the Notice. *See* FRA, Response to Petition for Reconsideration filed in Docket No. FRA-2018-0091; Approval of BNSF Railway Company Test Program to Evaluate Automated Track Inspection Technologies (Feb. 8, 2019) (“Reconsideration Decision”). FRA explained that the Test Program is designed to “determine whether a specific combination of visual and automated inspections” enhances safety and that it is “not possible to test the effectiveness of such new methodologies if current inspection practices are conducted alongside the Test Program.” *Id.* at 7. FRA also explained how the safety conditions set out in the Approval Letter and the Notice adequately assure the Test Program’s safety. *See id.* at 7–8. Pursuant to the Hobbs Administrative Orders Review Act, the Union timely petitioned this court for review of FRA’s suspension of the manual inspection requirements. *See* 28 U.S.C. § 2342.

This court reviews Hobbs Act petitions under the standards set out in the Administrative Procedure Act. *See BNSF Ry. Co. v. U.S. Dep’t of Transp.*, 566 F.3d 200, 203 (D.C. Cir. 2009). The Union argues that FRA’s suspension must be vacated under the arbitrary and capricious standard of review. This standard requires the agency to demonstrate a “rational connection between the facts found and the choice made,” *id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)), but “forbids a court from substituting its judgment for that of the agency,” *Env’tl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). Furthermore, “an agency action may be set aside as arbitrary and capricious if the agency fails to ‘comply with its own regulations.’” *Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (quoting *Environmental, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011)).

In its petition for review, the Union again argues that FRA failed to comply with the suspension regulation’s necessity and safety requirements. First, the Union argues FRA did not provide a reasoned explanation for why it was “necessary” to suspend the current manual

inspections to facilitate the Test Program, relying in part on alleged inconsistencies between FRA's reasoning in the Reconsideration Decision and the Notice. Second, the Union argues that FRA did not adequately explain how the conditions imposed on the Test Program are "sufficient to assure safety."

We hold that FRA engaged in reasoned decisionmaking. First, FRA has maintained its rationale regarding necessity—that it is "not possible to test the effectiveness" of "new combinations of visual and automated inspections at different frequencies" without suspending the regulation—from its initial approval of the Test Program. Reconsideration Decision at 7; *see also* 83 Fed. Reg. at 55,449–55,450. In its petition for suspension, BNSF indicated that the Test Program seeks to evaluate a new inspection methodology that combines automated and manual inspections to allow human inspectors to "more effectively verify and focus on the identified track anomalies." BNSF Railway, Petition for a Temporary Suspension of 49 C.F.R. § 213.233(b) and (c) to Allow for the Testing of Automated Track Inspection Methodologies, at 1 (July 31, 2018). In the Notice, FRA set out the phased Test Program, including various adjustments to the frequency of manual and automated inspections and "[d]ata-driven focused manual visual inspections." 83 Fed. Reg. at 55,450. FRA also indicated the technology is being tested as an "alternative" and "supplement" to the current manual inspection method. *Id.* at 55,449. Finally, FRA advanced the same rationale in the Reconsideration Decision—the Test Program is designed to "help determine whether a specific combination of visual and automated inspections produces the greatest results for both safety and operational benefits." Reconsideration Decision at 7. The continuation of the current manual inspection schedule would preclude the Test Program from "provid[ing] the type of data it meant to provide" regarding the effectiveness of the automated inspection technology. *See id.*

FRA adequately and consistently explained this rationale in its Approval Letter, Notice, and Reconsideration Decision. *See Globalstar, Inc. v. FCC*, 564 F.3d 476, 479–80 (D.C. Cir. 2009) ("The 2007 Reconsideration Order was an outgrowth of the ongoing rulemaking."). FRA has reasonably explained why the temporary suspension is "necessary" to accomplish the purposes of the Test Program. *See* 49 C.F.R. § 211.51(a)(1); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Second, FRA has adequately explained how the Test Program is "conditioned on the observance of standards sufficient to assure safety." 49 C.F.R. § 211.51(a)(3). In the Notice and the Approval Letter, FRA explained how program conditions are "designed to ensure the safety of the Test Program." *See* 83 Fed. Reg. at 55,450; Approval Letter at 2–4. The Test Program can proceed only if BNSF meets safety benchmarks of increasing stringency at each phase. *See* 83 Fed. Reg. at 55,450. FRA employed this careful approach "to ensure that each phase of the Test Program results in continuous safety improvement before moving to the next phase." Reconsideration Decision at 7–8. FRA also responded to safety concerns raised by the Union's declarants. The Union's declarants testified that some defects can be spotted only by human inspectors. FRA rebutted this testimony by explaining that "automated inspections have proven to be significantly more effective at detecting and measuring geometry conditions" than human inspectors; the defects cited by the Union declarants "generally include a change in track geometry, which is detectable by the automated inspections;" and any remaining defects will be detectable by the continued manual inspections "before they pose a safety risk." *Id.* at 8. The agency thus "engage[d] the arguments raised before it," *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992), and reasonably explained how the temporary suspension of manual inspections is "conditioned on the observance of standards sufficient to assure safety." 49 C.F.R. § 211.51(a)(3);

see also Otis Elevator Co. v. Sec’y of Labor, 762 F.3d 116, 122–23 (D.C. Cir. 2014).¹

In sum, FRA has articulated “a rational connection between the facts found and the choice made.” *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43). Because the agency’s decision to temporarily suspend § 213.233(c) was not arbitrary and capricious, we deny the Union’s petition for review and lift this court’s May 22, 2019, order granting in part the Union’s motion for stay pending judicial review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

¹ The Union also argues that FRA’s approval of the Test Program violated the § 213.233(d) remediation requirement, which was not suspended. The Union did not adequately raise this argument in its petition for reconsideration and it is therefore waived. *See Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (“[I]ssues not raised before an agency are waived and will not be considered by a court on review.” (quoting *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004))).