

To: All Local Chairmen:

From: John Hancock, GC

Please note the joint statement of five rail unions concerning public policy by the Department of Transportation

This is update to let you know of what your Union is doing in connection with cell phone.



June 17, 2010

(Via online at www.regulations.gov)

Docket Operations Facility
U. S. Department of Transportation
1200 New Jersey Avenue, SE, W12-140
Washington, DC 20590

Re: Docket Number FRA-2009-0118

**Comments of the
American Train Dispatchers Association (ATDA)
Brotherhood of Maintenance of Way Employees Division (BMWED/IBT)
Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT)
Brotherhood of Railroad Signalmen (BRS)
United Transportation Union (UTU)**

These joint comments are submitted by five labor organizations, the Brotherhood of Locomotive Engineers and Trainmen, the United Transportation Union, the Brotherhood of Railroad Signalmen, the Brotherhood of Maintenance of Way Employees Division, and the American Train Dispatchers Association, who are the recognized collective bargaining representatives of a significant majority of railroad industry workers engaged in train operations; train dispatching; and track, signal, and electronics installation, maintenance, and inspection. As such, our collective memberships have a vested interest in railroad safety as it relates to public policy and rulemaking, and, specifically, the use of cellular telephones and other electronic devices as outlined in the notice of proposed rule making (NPRM) published on May 18, Docket No. FRA-2009-0118.

We appreciate FRA's legitimate concern for improving safety in our industry and we hope FRA accepts these comments in the spirit in which they are intended — that is, to improve safety while allowing for the employees subject to this rule to maintain reasonable access to their families and competently and safely document the recurring health and safety violations that our members witness and endure during their workday. In some instances, we feel the NPRM may actually reduce the level of safety, and in others we believe the proposed rule adds no value to safety and, therefore, unnecessarily constrains the operating employees' access to information and their families.

We are thankful FRA has recognized the value of our previous comments by incorporating those principles into the NPRM. However, after nearly 18 months experience, we have identified

additional areas and issues that should be given consideration in the development of the final rule. We hope FRA will give the same weight to these additional comments.

FRA seeks comments concerning four discrete areas. First, it requests “comment regarding whether violations of this proposed subpart should be a basis for revoking a locomotive engineer’s certification.” 75 Fed. Reg. at 27673. More specifically, in Section IV.C of the Preamble, entitled “Locomotive Engineer Certification Revocation,” FRA states that it

is considering amending 49 CFR part 240 (part 240) to add violations of this subpart as a basis for revoking a locomotive engineer’s certification. See 49 CFR 240.117(e). FRA specifically invites comments on this issue and based on the comments received may include a revision of part 240 in the final rule issued in this rulemaking.

Id. at 27678.

Second, FRA states the following with respect to enforcement of the rule:

Because of the evidentiary difficulties associated with establishing violations of restrictions on use of electronic devices, and the help that personal phone records would provide, FRA considered adding a provision regarding those records. FRA debated requiring railroads to require their operating employees to allow the railroads access to the employees’ personal cell phone records if the employees were involved in any accident for which the employer has a reasonable belief that the employees’ acts or omissions contributed to the occurrence or severity of the accident. FRA declines to add such a provision at this time. A significant factor in this determination is the broad statutory authority that FRA has to investigate accidents, including the issuance of subpoenas, under 49 U.S.C. 20107 or 20902. When there is a reasonable belief that an accident was caused or affected by a railroad operating employee’s actions or omissions, FRA will subpoena that employee’s cell phone records or other personal records if they are related to FRA’s investigation. FRA does so now. However, FRA is requesting comment on the utility of such a provision and whether it would be useful in gathering data on safety incidents that do not result in accidents. FRA also seeks comment on the privacy concerns implicated by such a measure and on any suggested procedures or limitations that should be followed in the event FRA ever proposed such a provision.

Id. at 27678.

Third, in its analysis of proposed Section 220.309 (“Permitted Uses”), FRA states that

This section proposes to establish six uses of electronic devices that FRA finds to be permissible. This list is intended to be exhaustive. FRA has specifically weighed other exceptions and uses, such as the BLET and UTU’s proposed GPS device exception discussed above. After contemplating those other uses, at this time FRA does not agree there is a need for further permitted use of electronic devices other than those described here. However, we welcome additional comment and input on this subject.

Id. at 27681.

Finally, the Preamble indicates that

FRA did not, however, expressly include an exception for personal emergencies. FRA requests comments on whether an express exception should be created to address personal emergency situations and, if so, how it should be expressed.

Id. at 27678 (emphasis added).

We will address a threshold policy issue, then respond to the areas which FRA specifically requested comment, and will close with comments concerning other issues implicated by the proposed rule.

The threshold issue is the scope of the proposed rule. FRA affirms that the proposed revision to Section 220.1 “establishes that these are only minimum restrictions that must be complied with and that railroads are free to impose stricter prohibitions at their discretion.” 75 Fed. Reg. at 27679. Indeed, FRA “fully anticipate[s] that railroads will implement even stricter guidelines via operating rules.” Although this scope is consistent with most FRA regulations, prior experience with the “minimum standard” scope instructs that this scope often results in inconsistent application or unintended consequences and has, in the past, produced applications plainly contrary to FRA’s intent. For this reason, FRA is regularly compelled to revisit seemingly clear regulatory language, as the history of Part 240 amply demonstrates. Although FRA has repeatedly shown a willingness to address their regulations to correct these abuses, the time lapse between identifying an abuse or unintended consequence and addressing it can significantly harm individuals without providing them any means of redress for situations that precede an amendment to a rule becoming effective. It is clear that the minimum standard approach has caused as many problems as it has solved and the same failing is present in the proposed rule. Therefore, the minimum standard is inappropriate for application to Subpart C for two reasons.

First, as previously noted, FRA granted the substance of three of the four requests made in the BLET/UTU Petition for Review (i.e., use by deadheading employees, photographic/video documentation of safety violations and hazards, and calculators). Among the reasons given by FRA for acting affirmatively on our request are the following:

- Regarding deadheading employees, FRA “recognize[d] that the scope of the [Emergency] Order is far-reaching and in some cases, covers employees in situations in which the safety hazards that the Order was designed to prevent do not arise.” Id. at 27677.
- With respect to cameras, FRA acknowledged “that allowing employees to document safety hazards could be useful in certain situations.” Id.
- Concerning calculators, “FRA agree[d] that train crews can have a legitimate need for a calculator in some instances[and to] that end, FRA has decided to exclude stand-alone calculators from all restrictions within this subpart as long as the calculator is used for an

authorized business purpose and does not interfere with the performance of any employee's safety-related duties." Id. at 27678.

FRA's proposed scope for Subpart C would permit railroads to diminish safety by promulgating "more stringent requirements" that would eliminate the distinction between deadheading and working employees and to prohibit the use of cameras and calculators, thereby nullifying the additional safety measures FRA explicitly embraces at our urging. If a railroad was permitted to utilize the "minimum standard" to implement a "more stringent requirement" that outlaws the use of cameras, for example, it would sanction a condition that could permit the railroad to continue to violate safety requirements without a reasonable means to document such violations. Furthermore, prohibiting the use of calculators when necessary for purposes of 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 actually increases risk. Thus, the proposed scope would unintentionally result in a diminution of safety.

The second problem with FRA's proposed scope is that an enforcement nightmare would arise if, indeed, FRA decided to add Subpart C violations to the list of Part 240 "cardinal sins." The subject of whether these should be revocable offenses is addressed in more detail below. Suffice it to say for now that at least two serious problems flowing from a "minimum standard" scope are easily foreseeable. First, there is no way to limit certification enforcement to Part 240. The rulemaking for Part 242 — dealing with conductor certification — is using Part 240's "cardinal sins" as a baseline for revocable offenses; adding Subpart C to Part 240 necessarily will result in adding it to Part 242, meaning that every time an engineer's certification is revoked for an alleged violation of Subpart C, his/her conductor's certification is at risk for failing to take action to prevent the engineer's violation. Second, the predicate for "cardinal sin" revocations are "violations of [railroad] *operating rules and practices*." 49 C.F.R. § 240.117(e) (emphasis added). Even after several major revisions to Part 240 in response to industry abuses, there continues to be a persistent flow of disputes at various levels of the Part 240 dispute resolution process that reflect a tension between a specific regulatory requirement and a corresponding railroad rule that is "more stringent." Moreover, when Part 242 becomes effective, FRA can expect to see at least a doubling in the number of cases it handles, and the proposed scope would further add to an already burdened system.

To address this problem, we recommend proposing that FRA revise Section 220.1 to read as follows:

This part prescribes Subparts A and B prescribe minimum requirements governing the use of wireless communications in connection with railroad operations. In addition, this part sets forth prohibitions, restrictions, and requirements that apply to the use of personal and railroad-supplied cellular telephones and other electronic devices. So long as these the minimum requirements set forth in these Subparts are met, railroads may adopt additional or more stringent requirements. In addition, Subpart C sets forth uniform prohibitions, restrictions, and requirements that apply to the use of personal and railroad-supplied cellular telephones and other electronic devices; railroads may not adopt

additional or more stringent requirements to any Subpart C prohibition, restriction, or requirement.

49 CFR part 240 should not be amended to add violations of 49 CFR part 220 Subpart C.

We oppose expanding the list of Part 240 “cardinal sins” by adding Subpart C to the list. Without in the least diminishing the tragic consequences that already have ensued in which improper use of a personal electronic device was implicated, the data that have been presented simply do not support inclusion. According to FRA, the five “cardinal sins” were designated as having revocation consequences because they were implicated in “a significant portion (more than 5,000) of the 6,990 train accidents” between 1977 and 1987 in which the twenty most common engineer-related human factor errors were a cause. 56 Fed. Reg. 28235 (Jun. 19, 1991). However, FRA’s experience under EO 26 has been far different:

In the period from the effective date of the Order, October 27, 2008, through December 7, 2009, FRA inspectors discovered approximately 200 instances in which the Order may have been violated. FRA’s Office of Railroad Safety recommended enforcement action against the employee or railroad in 36 of these instances. All 36 of these actions were based on a railroad employee’s using an electronic device, failing to have its earpiece removed from the employee’s ear, or failing to have the device turned off in a potentially unsafe situation. Of these 36 instances, approximately half of them involved an employee using or failing to have a cell phone turned off while in the cab of a locomotive during a potentially hazardous time. In addition, 33 of the incidents recommended for enforcement action involved personal, as opposed to railroad-supplied, devices.

75 Fed. Reg. at 27674.

We believe several conclusions can be drawn from FRA’s data. First, and at least up until six months ago, the number of possible EO 26 violations continues to be of concern. Further, both FRA and railroads have sufficiently rigorous programs to detect possible violations, and FRA has not hesitated to apply the existing enforcement tools. Finally, the absence of any indication that any of these possible violations led to a reportable accident/injury or casualty can only mean that none of those outcomes occurred, which, alone, makes these violations qualitatively different from the current list of “cardinal sins.”

Moreover, simply providing the gross number of potential violations sheds no light on whether there is a pattern sufficient to warrant imposing the draconian punishment that would result from the expansion of 49 C.F.R. § 240.117(e).¹ Numerous questions pertaining to the data exist, none of which are answered in the NPRM, such as:

¹ Indeed, and as indicated above, the scope would become much broader than FRA suggests, because a rulemaking currently is underway for the certification of Conductors, the revocation portions of which will closely mirror Part 240.

- As training and testing on EO 26 progressed, we would expect that the number of potential violations to decrease over time. All or parts of 15 months are included in the period identified by FRA in the NPRM. If that period is broken down into 3-month (i.e., quarterly) segments, what is the trend line for potential violations? A downward trend would indicate compliance is increasing and the current enforcement methods are appropriate and effective.
- What percentage of the potential violations occurred on Class I railroads, which account for 95% of freight revenue and carry the overwhelming majority of the most hazardous cargo? What percentage of the potential violations occurred on Class II and Class III railroads, where the use of portable electronic devices for train control purposes is far more prevalent than on Class I railroads? Because EO 26 and the proposed rule will be applied differently to smaller railroads than to Class I railroads, including the potential violation data from Class II and Class III railroads fails to provide an “apples-to-apples” comparison when considering whether to expand the scope of 49 C.F.R. § 240.117(e).
- Of the total number of potential violations, how many of the violators were railroads, rather than individuals? How many of the remaining potential violations were committed by employees of those railroads? When considering whether to expand the scope of 49 C.F.R. § 240.117(e), it would be outrageous to consider any employee violation that occurred on a railroad where the railroad, itself, also is suspected of having violated EO 26, because there is no assurance that the railroad provided the correct information concerning EO 26, or that the railroad sufficiently stressed the importance of absolute compliance.

We strongly believe that the only appropriate starting point for a reasonable consideration of the question whether 49 C.F.R. § 240.117(e) should be expanded is what data and trends exist with respect to potential violations of EO 26 by employees on Class I railroads that, themselves, did not potentially violate the Emergency Order. The single, aggregate number included in the Preamble to the Proposed Rule, albeit surprising, does not begin to provide a basis for such a discussion.

It also must be noted that FRA has sufficient enforcement tools at its disposal and cited its ability to detect violations and its authority to punish individuals who it believes are impermissibly using electronic devices:

When there is a reasonable belief that an accident was caused or affected by a railroad operating employee’s actions or omissions, FRA will subpoena that employee’s cell phone records or other personal records if they are related to FRA’s investigation. FRA does so now.

Id. at 27678.

If FRA were to find a probable violation of the final rule had occurred, FRA could attempt to take action against an individual employee by way of its authority to impose a monetary civil penalty or disqualification of that employee from safety-sensitive service. Id. at 27682.

Alternatively, if FRA decides to forego an objective analysis and utilization of the railroad accident data and adds Subpart C infractions to 49 CFR §240.117(e), the regulation must clearly state that revocation consequences are appropriate **only when an electronic device is improperly used while the employee is performing safety related duties and such improper use contributed to an event identified in 49 C.F.R. § 219.201, thereby triggering mandatory post-accident toxicological testing for alcohol and drugs.**² The overwhelming majority of the operating employees who would be subject to this rule perform their duties safely and with integrity every day for their entire careers. However, we are all human, and occasionally may simply forget to turn off appliances or devices such as cell phones. Moreover, some of the devices currently on the market are not equipped with a standard “On/Off” switch; instead, non-use triggers a “sleep” mode for the device, which is automatically powered on upon opening the cover or touching a key or the screen, thereby giving a false impression as to the status of the device.

The accidents and incidents that FRA cited to support issuing Emergency Order 26 and the NPRM for part 220 all identify use of the electronic device while the train or vehicle was moving as the distracting circumstances and the underlying cause of those accidents. In the NPRM, FRA cited seven accidents, five railroad accidents, one aviation incident and one highway accident:

- 1) On June 8, 2008, a Union Pacific Railroad Company (UP) brakeman was struck and killed by the train to which he was assigned. “The brakeman was talking on his cell phone at the time of the accident.” (emphasis added)
- 2) On July 1, 2006, a northward BNSF Railway Company (BNSF) freight train collided with the rear of a standing BNSF freight train at Marshall, Texas. There were estimated damages of \$413,194. “...the locomotive engineer ...was engaged in cell phone conversations immediately prior to the accident.” (emphasis added)
- 3) On December 21, 2005, a contractor working on property of The Kansas City Southern Railway Company at Copeville, Texas. “...the contractor was talking on a cell phone at the time of the accident.” (emphasis added)

² Those events are: (1) a major train accident, which is defined as a rail equipment accident involving damage in excess of the current reporting threshold) that involves (A) a fatality, (B) a release of hazardous material lading from railroad equipment accompanied by an evacuation or a reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material), or (C) damage to railroad property of \$1,000,000 or more; (2) a rail equipment accident defined as an “impact accident” in 49 C.F.R. § 219.5 that involves damage in excess of the current reporting threshold, resulting in (A) a reportable injury, or (B) damage to railroad property of \$150,000 or more; (3) any train incident that involves a fatality to any on-duty railroad employee; and (4) a reportable injury to any person in a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train. 49 C.F.R. § 219.201.

- 4) On May 19, 2004 two BNSF freight trains collided head-on near Gunter, Texas. "...personal cell phone calls were made and/or received by the five crewmembers on both trains while the trains were in motion." (emphasis added)
- 5) On May 28, 2002, an eastbound BNSF coal train collided head on with a westbound BNSF intermodal train near Clarendon, Texas. The conductor and engineer of the coal train received critical injuries and damages exceeded \$8,000,000. "...the use of a cell phone by the engineer of one of the trains may have distracted him..." (emphasis added)
- 6) On October 21, 2009, Northwest Airlines Flight 188 overflew its destination airport by approximately 150 miles. The crew had been "...using personal laptop computers..." (emphasis added)
- 7) On November 14, 2004, a bus struck a bridge on the George Washington Parkway in Alexandria, Virginia. "...the bus driver said he had been talking on [] cell phone at the time of the accident" (emphasis added)

75 Fed. Reg. at 27673–27674.

Also, the scientific data that FRA cited when it issued Emergency Order 26, which is the foundation for the proposed rule, identified performing additional tasks such as using a cellular phone as the actual distracting condition that increases risks for accidents.

"There is considerable scientific evidence that cell phone use, both for oral conversation and for text messaging, increases the risk of highway accidents as a result of driver distraction (Brown and Poulton, 1961; Burns, Parkes, Burton, Smith and Burch, 2002; McCartt, Hellinga, and Braitman, 2006; Parkes, Luke, Burns and Lansdown, 2007; Ranney, 2008; Reid and Robbins, 2008). "Driver distraction" is defined by the Australian Road Safety Board (Trezise, Stoney, Bishop, Eren, Harkness, Langdon, and Mulder, 2006) as follows:

Driver distraction is the voluntary or involuntary diversion of attention from the primary driving tasks not related to impairment (from alcohol, drugs, fatigue, or a medical condition) where the diversion occurs because the driver is performing an additional task (or tasks) and temporarily focusing on an object, event, or person not related to the primary driving tasks. The diversion reduces a driver's situational awareness, decision making, and/or performance resulting, in some instances, in a collision or near-miss or corrective action by the driver and/or other road user."

73 Fed. Reg. at 58706 (emphasis added).

FRA cited no evidence that merely having a cell phone turned on creates an unsafe condition. All of the incidents FRA relied upon indicate that the actual use or the performance of an additional task while the train or vehicle was moving combined was the distracting condition, not the fact that the device is in the "on" mode. FRA alluded to the issue of "on/off" mode in the preamble of Emergency Order 26:

FRA inspectors report that they frequently observe cell phones or PDAs within reach of locomotive engineers operating trains. If the devices ring, the locomotive

engineers rarely answer in the presence of the FRA inspector, but the circumstances lead a responsible person to conclude that they would answer if the FRA inspector were not present.

Id. at 58705.

This comment in the preamble of EO 26 speculates about what would happen if a phone were to ring and the FRA inspector was not present. Many of the disputes involving EO 26 that arise are a result of discovering an employee with a cell phone turned on at the time of an operational test. If Part 240 is amended to add violations of 49 CFR § 220 Subpart C, the amendment to the rule would be based on that unsubstantiated speculation.

An individual could have their certification revoked even if the phone or electronic device is left on, never rings or makes a noise and the individual is unaware the device is on. Moreover, given the railroads' record of implementing unintended applications of Part 240, if FRA amends part 240, it must be clear about the circumstances that may result in revocation consequences, especially when considering the agency's and the railroad industry's position on 49 C.F.R. § 240.307(h)(2), "minimal nature" incidents, that have no direct or potential effect on rail safety.³

It would be an excessive penalty for an individual to suffer a revocation simply because he/she inadvertently left a cell phone or camera in the "on" mode when they went on duty. Because the rule providing railroads with discretion to decide not to bring revocation charges against an employee for minor incidents has been interpreted as not including an obligation that it be reasonably applied, FRA needs to **explicitly require** a reasonable application in promulgating this rule.

If the final rule does require that electronic devices be "turned off" to be in compliance with Subpart C, failure to comply should not result in a revocation, because

- there is no evidence whatsoever that merely having a device in the "on" mode creates a distraction that results in an unsafe condition;
- the railroads have taken the position that they may still revoke a certification even when *de minimis* infractions occur (such as having the device turned on) that have no effect on safety; and
- other remedies exist for FRA and the railroads.

The rule should not require railroads to require employees to provide access to cell phone records

³ See Docket No. FRA-20070032-0027.1 at p. 9, wherein FRA and Union Pacific Railroad successfully argued — regarding the *de minimis* provision set forth in 49 C.F.R. § 240.307(i)(2) — that (1) no railroad has an obligation to make the determination called for in the rule, and (2) even if a determination was made that a *de minimis* violation occurred, the railroad has no obligation to treat it as such.

FRA has declined to add such a provision at this time. We believe this is the correct conclusion and the idea should be discarded. However, "FRA request[ed] comment on the utility of such a provision and whether it would be useful in gathering data on safety incidents that do not result in accidents." 75 Fed. Reg. at 27678.

The idea FRA seeks comment on here would require operating employees to allow the railroad access to their personal cell phone records if the railroad believed the employee's acts or omissions contributed to an accident. Bestowing this authority upon the railroads is unnecessary to provide a safely operating railroad industry and constitutes an unwarranted and dangerous intrusion into the personal lives of the employees and their families. First, FRA acknowledges that it already has the authority to subpoena an individual's phone records when it believes an accident was caused by inattention or a distraction from the use of a cell phone; therefore, such a provision is unnecessary.

When there is a reasonable belief that an accident was caused or affected by a railroad operating employee's actions or omissions, FRA will subpoena that employee's cell phone records or other personal records if they are related to FRA's investigation. FRA does so now.

Id.

Given nearly two decades of serious problems with repeated railroad abuse in the application of Part 240, which is well documented elsewhere in the public record, granting such authority as FRA suggests here will undoubtedly lead to new and additional abuse. We believe the proposed rule can be effective and safety can be enhanced without unnecessarily penalizing the employees or subjecting them and their families to the indignities of personal intrusions by nosy managers.

Granting such authority to the railroads, coupled together with the unlimited right to adopt more stringent rules, will result in harassment of our members by accessing their personal phone records for any and every incident. It would result in fishing expeditions and the railroads will mine the information gleaned there to bring charges against our members for unrelated incidents. Moreover, cell phone plans and programs allow for multiple participants in the plan such as friends and family. Requiring the operating employees to provide access to their phone records also exposes their family to outrageous intrusions of their privacy. The determination and authority to review cell phone records is better left with FRA, and we most strongly object to FRA considering this option any further.

The rule should allow for the use of electronic devices in personal emergencies and expand the six exceptions.

In the NPRM, FRA also requested comments on whether it should include an express exception for personal emergencies. FRA did not include an exception for personal emergencies in the proposed rule. FRA requests comments on whether an express exception should be created to address personal emergency situations and, if so, how it should be expressed. We believe

compelling reasons exist to permit a limited “personal emergency” exception, pointing out once again the problem with allowing railroads to adopt more stringent rules that prohibit the use of electronic devices. If FRA adopts such a reasonable “personal emergency” exception, the railroads still would be free to restrict the use of electronic devices in emergency situations, thereby defeating the purpose of the exception.

Under the rule as proposed, an operating employee could not contact family — or, for that matter, an emergency health care provider to provide authorization for medical treatment for the employee’s child — when they become aware of the need to do so without violating the regulation, even if the railroad takes no exception. This is unreasonable because operating employees can be out of contact with their families for extended periods of time. By creating consequences for contacting their families when they are injured, ill, or infirm — or the physicians who treat family members — the lack of a “personal emergency” exception diminishes safety, because worrying “in the dark” about the health and well-being of family is, itself, a distracting condition. Therefore, FRA should specifically allow such an exception by amending proposed section 220.309(b) as follows,

An electronic device as necessary to respond to ~~an~~ a personal or family emergency or an emergency situation involving the operation of the railroad or encountered while performing a duty for the railroad.

Also, as we stated above, allowing the railroads to implement more stringent rules would permit the railroads to re-introduce that distraction. This is yet another reason for FRA to adopt our changes to proposed § 220.1 by making Subpart C a uniform standard.

Legitimate uses for electronic devices should be expanded to include the camera and calculator feature of cellular phones, as well as the use of a cell phone for voice communication to report equipment defects to the mechanical department and other electronic devices to document health and safety violations. In the NPRM, FRA included a provision to use a camera if that use does not interfere with the employees’ safety-related duties.

We believe that the camera and voice features on a cellular phone can be safely utilized with the same restrictions that FRA has enumerated in proposed § 220.309(c)(2)&(3). We also believe that other electronic devices that are necessary to document health and safety hazards can be used safely and should be included as additional permitted uses. For example, it may be necessary to document a violation of the 49 CFR § 229.43(a), which is the regulation that requires the proper release of combustion gases such as carbon monoxide outside the cab or operating compartment. A camera alone would be insufficient to document an excessive carbon monoxide build-up in the operating compartment of a locomotive. Also, it may be necessary to use a CO detector while the train is moving to evaluate the hazard under normal operating conditions. It is also impossible for a camera to document a violation of § 229.137(a), which requires adequate ventilation of sanitation compartments. Likewise, a camera alone would not allow for an adequate documentation of a violation of § 229.119(d) (proper ventilation and heating arrangements).

We expect the railroads to argue that adequate procedures exist to report safety hazards and that § 220.309(c) is unnecessary. However, we remind FRA that the mere word of the employee is usually insufficient for FRA to initiate investigations, much less issue penalties and provide an effective deterrent from a railroad dispatching defective equipment. Adequate documentation is almost always necessary to avoid a "he said, she said" outcome. Also, the employees must have the ability to document the defective condition at the time the train is operated. Without the ability to do so, railroads will be able to dispatch defective equipment and/or repair it before the any independent investigation could begin. Therefore, we urge FRA to amend proposed Section 220.309(c)(1) as follows,

The device's device is used ~~primary function is~~ as a camera for taking still pictures or videos. ~~(A camera that is part of a cell phone or other multi-functional electronic device is not included in this exception.)~~

We believe it is unnecessary to require employees to carry several separate electronic devices on a daily basis to effectively and safely perform their duties. In the section by section analysis FRA noted,

Paragraph (d) permits the use of a calculator, as also suggested by the BLET and UTU in response to the Order. The use of this device is common in the railroad industry for important safety-related purposes. Train tonnage, train length, and train stopping formulas are commonly computed using a calculator. An example of the safety related reasons for allowing the use of a calculator includes the need to compute train length accurately so that a locomotive engineer (via the locomotive's distance counter) can accurately ascertain when his or her train has cleared a relevant speed restriction, interlocking, or working limits.

75 Fed. Reg. at 27681 (emphasis added).

FRA's rationale for allowing the use of calculators is exactly the reason we sought to have GPS devices permitted in our comments submitted regarding the Emergency Order. The calculation utilized for train stopping formulas are clearly going to be less reliable if the engineer is unaware that the speed indicator is inaccurate. Clearly the calculation for stopping distance is going to be different to stop the same train at fifty MPH as opposed to fifty-five MPH.

Also we believe that Global Positioning Systems (GPS) are electronic devices whose use unquestionably enhances safety. The use of these devices should be permitted because, when used properly they can be critical for the operating employees to provide the safest possible operation of their trains and possibly save lives. For example, operating employees are frequently confronted with weather so severe that visibility is compromised. Every operating employee has confronted the issue of dark signals as well. The use of GPS enables operating employees to determine with a great degree of accuracy the locations of signals, sidings, grade crossings and many other physical characteristics of the railroad.

Using the example that FRA cited to support the inclusion of calculators, clearing relevant speed restrictions, interlocking, or working limits is obviously important but it is even more safety critical to know when a train is approaching an interlocking, speed restriction or working limit. That is the reason PTC regulations specifically require the technology be able to prevent incursions into these areas. The opportunity to provide a safer railroad operation through the use of this technology should not be squandered.

Accordingly we urge FRA to reconsider its decision and include GPS devices in proposed § 220.309(d) to allow the engineer to determine any deviation in the accuracy of the speed indicator in the lead engine and enhance safety when weather conditions inhibit the crew members vision.

Section 220.309(d) should be amended as follows,

A ~~stand-alone~~ calculator or GPS device if used for an authorized business purpose.

Some of the more severe safety hazards that operating employees encounter are not always visible. Restricting the permissible electronic devices for documenting those invisible hazards to cameras renders the employee defenseless against those hazards. Therefore, we urge FRA to add a new Section 220.309(g) as follows,

(g) Other electronic devices that are necessary to adequately document a safety hazard or a violation of a rail safety law, regulation, order, or standard, provided that the devices are turned off immediately after the documentation has been made.

If FRA is not willing to permit the use of these additional electronic devices, the inability to adequately document violations of safety laws and regulations remains a legitimate concern of the operating employees and should be addressed. Accordingly, we offer the alternative approach of documenting violations by amending 49 CFR part 229 subpart C by adding a new section,

§ 229.141 Good faith challenges

(a) An employee operating a locomotive shall inform the employer whenever the employee makes a good-faith determination that the Locomotive does not comply with FRA regulations or has a condition that inhibits its safe operation.

(b) Any employee charged with operating a locomotive covered by 49 CFR §229 subpart C may refuse to operate the engine if the employee makes a good-faith determination that it does not comply with the requirements of § 229.117 (speed indicators) § 229.119(d) (ventilation and heating arrangement) § 229.121 (Locomotive Cab Noise) (See also appendix H) § 229.137 (Sanitation, general requirements) § 229.139 (Sanitation, servicing

requirements) or has a condition that inhibits its safe operation that cannot be documented with the use of a camera or video recording device. The employer shall not require the employee to operate the engine until the challenge resulting from the good-faith determination is resolved.

- (c) Each employer shall have in place and follow written procedures to assure prompt and equitable resolution of challenges resulting from good-faith determinations made in accordance with this section. The procedures shall include specific steps to be taken by the employer to investigate each good-faith challenge, as well as procedures to follow once the employer finds a challenged locomotive engine does not comply with 49 CFR § 229 or is otherwise unsafe to operate. The procedures shall also include the title and location of the employer's designated official.

Definition of Authorized Business Purpose

Distractions resulting from the use of electronic devices can result in railroad accidents that have catastrophic consequences. Those distractions could occur regardless of the content of the conversation. FRA intends to permit the railroads to allow their business interest to be addressed by declaring that use of electronic devices is permitted for an “authorized business purpose.” This term is relied upon to define railroad-supplied electronic devices. The term is sufficiently vague so that it could include an authorization or requirement for the operating employees to call for deadhead transportation, contact the crew dispatcher for their next duty assignment, or contact supervisors to answer questions regarding incidents from previous duty tours, — or in the case of passenger operations — to search for passenger’s lost articles. Therefore, FRA should require railroads to specifically define the purposes for which the use of railroad-supplied electronic devices is intended. We propose adding a definition to 49 C.F.R. § 220.5 Definitions, for “Authorized Business Purpose” as follows,

Authorized Business Purpose” means

- 1) a purpose that is necessary to report, document or prevent an imminent safety hazard that could result the loss of human life or injuries or,
- 2) to update operational instructions or otherwise ensure the safe operation of the train to which the employee is assigned and,
- 3) such purposes have been identified in the railroad’s operating rules, its instruction program submitted in accordance with § 220.313 and,
- 4) has been approved by FRA.

Additional proposed changes to the NPRM

Section 220.303 General Use of Electronic Devices —

This proposed section would prohibit railroad operating employees from using electronic devices in any way that would detract from railroad safety, irrespective of the other specific provisions and exceptions to this rule. ... This paragraph is also meant to encompass other potential uses of electronic devices that may arise outside those detailed or contemplated by this proposed rule or by railroad operating rules. Section 220.303 is intended to be restrictive, as FRA views any use of electronic devices not contemplated in this proposed subpart as capable of distracting employees while on duty.

75 Fed. Reg. at 27680.

FRA correctly noted that the use of electronic devices can have a distracting effect on the operating employees and attempted to address that potential safety hazard by restricting the use of these electronic devices. However, FRA left open the possibility that employees other than “operating employees” could occupy the engine while the train is moving or other safety duties are being performed. The rule should be amended to prohibit any person occupying the cab of a controlling locomotive from using a distracting electronic device while safety-critical duties are being performed by the operating employees. FRA should further amend the proposed language so that it is clear that a railroad manager or supervisor is prohibited from ordering or instructing an employee to produce, use or turn on an electronic device when the operating employee reasonably believes that doing so would create a distraction or unsafe condition. Accordingly, we propose that § 220.303 should be amended to read as follows:

No individual shall ~~A railroad operating employee shall not~~ use an electronic device if that use would interfere with an operating ~~the employee's or another~~ employee's performance of safety-related duties. A railroad manager or supervisor shall not order or instruct an operating employee to produce, turn on or use an electronic device if doing so would create an unnecessary distraction or compromise safety.

In the Preamble review of Section 220.313 (entitled “Instruction”)

FRA notes that proposed paragraph (a)(2)(iii) would specifically require that instruction be provided on the distinctions between the requirements of the final rule and any more stringent railroad operating rules.

Id. at 27682.

Without retreating from our comments on § 220.1 “Scope” (above) that FRA should not permit the railroads to implement additional or more stringent operating rules for the use of electronic devices, for locomotive engineers and, eventually, conductors, the distinction between the regulation and the relevant railroad operating rule would be without any difference, because they would have their certification suspended or revoked for alleged violations of those more stringent railroad operating rules. There is essentially no distinction to instruct a certified

employee about, if revocation is based on a violation of the underlying operating rule. Thus, we disagree with FRA's premise in the preamble that

The distinction is also important given FRA's request for public comment above on whether violations of the final rule should be considered for purposes of locomotive engineer certification revocation in the future.

Id. at 27682.

Without the uniform rule approach provided by our suggested "scope" amendment, there is no meaningful distinction between the regulation and the more stringent operating rule and, therefore, no need for this subsection, at least as to certified locomotive engineers and conductors.

Finally, proposed § 220.315 "Operational tests and inspections; further restrictions on use of electronic devices", addresses predictable yet unintended and unreasonable practices that create an unnecessary distraction for the employee being tested. However, we believe the proposed rule should be expanded so that it is consistent with other proposed sections of the rule. Section 220.315 should be amended as follows,

(b) When conducting a test or inspection under Part 217 of this chapter, a railroad officer, manager, or supervisor is prohibited from calling the personal electronic device or the railroad-supplied electronic device used by a crew member while the train to which the crew member is assigned is:

(i) moving;

(ii) When any member of the crew is—

(a) On the ground, or

(b) Riding rolling equipment during a switching operation; or

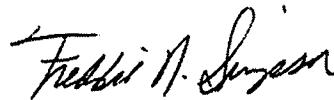
(iii) When any railroad employee is assisting in preparation of the train for movement.

We would like to again thank FRA for its thoughtful consideration of these comments and respectfully request the administration adopt the changes we have suggested to the proposed rule.

Respectfully submitted,



W. Dan Pickett
International President, BRS



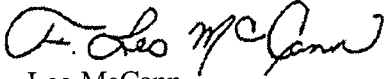
Freddie N. Simpson
President, BMWED/IBT



Mike Futhey
International President, UTU



Paul T. Sorrow
National President, BLET/IBT



Leo McCann
President, ATDA