



Memorandum

To: Advisory Board; General Chairmen; State Legislative Board Chairmen
From: Steve Bruno, Director of Regulatory Affairs
CC: Thomas A. Pontolillo, Assistant to the President and Director of Research
Date: October 22, 2010
Re: 49 CFR Part 220, Electronic Devices

On September 27, 2010, FRA published its final rule regarding restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices. FRA amended the scope and added definitions to the existing part 220 and implemented a new Subpart C "Electronic Devices". The rule becomes effective on March 26, 2011. Until that time, Emergency Order 26 remains in effect. Below is a history of the issue and an analysis of the rule with a review of our positions on the sub-issues and how FRA has responded as the rule has been developed. The rule places stricter restrictions on our members' personal electronic devices than it does on railroad supplied electronic devices.

As you know, regulatory language is written so that it defines prohibited behavior or acts, but our members often ask what is permissible – not prohibited – under the rules. So, I am sure there will be questions that I have not considered.

Background:

The first documented accident in which the use of cellular phones may have played a causal role occurred on May 28, 2002, near Clarendon, Texas, where two BNSF Railway (BNSF) trains collided, resulting in two fatalities. The National Transportation Safety Board ("NTSB") found that all four crewmembers involved in this accident had personal cell phones. According to cell phone records obtained by the NTSB, the locomotive engineer of the train at fault was using a cellular phone at the time the train exited the siding. In its investigation and report of the accident, the NTSB found that the use of a cell phone may have distracted the locomotive engineer and contributed to the accident.

This accident was the impetus for the NTSB and the FRA to consider the use of cellular telephones as a potential source of distraction in the railroad industry. Subsequently, NTSB issued Recommendation R-03-1 to FRA to: “Promulgate new or amended regulations that will control the use of cell telephones and similar wireless communication devices by railroad operating employees while on duty so that such use does not affect operational safety.”

The FRA reviewed its previous investigations of fatal railroad train incidents and/or collisions back to 2000 and began prospectively collecting data on the use of cellular telephones as a possible contributing factor in reportable train incidents and accidents. Several serious accidents occurred after this time where the FRA’s investigation concluded or implied that distraction from an employee using a cellular telephone was a possible contributing factor. Given the difficulty of enforcing prohibitions on the use of cellular telephones, FRA decided it was inappropriate to promulgate regulations and chose to generally address the issue of electronic devices by relying on the operating rules established by the individual railroads.

Also, beginning in September 2007, the Railroad Operating Rules Working Group of the FRA’s Railroad Safety Advisory Committee began a review of existing railroad rules, with an eye toward developing a “best practices” document for the industry. Subsequent meetings and discussions were held in November of 2007 and January of 2008, at which time there was agreement that, instead, FRA would issue a Safety Advisory on the subject, which would reflect the “best practices” identified by the Working Group. A draft Safety Advisory was reviewed and discussed in May 2008 and the Working Group set a deadline for completing the Safety Advisory for, ironically, September 25–26, 2008.

On September 12, 2008, a collision between a Metrolink passenger train and a Union Pacific freight train in Chatsworth, California, killed 25 people and injured hundreds more. FRA speculated that the locomotive engineer was distracted by text messaging when he passed a stop signal and proceeded into the path of an oncoming Union Pacific freight train. This accident changed the thinking at FRA. When the RSAC Working Group convened less than two weeks later, instead of finalizing the Safety Advisory, a draft of FRA’s proposed Emergency Order on the use of cell phones and other forms of wireless communication was presented.

Simultaneously, the U.S. Congress drafted and passed Public Law 110-432, the Rail Safety Improvement Act of 2008 (RSIA). And on October 16, 2008, President George W. Bush signed the RSIA into law. Section 405 of the RSIA, in reaction to the Chatsworth accident, required the Secretary of Transportation to study the impact of the use of personal electronic devices by safety-critical railroad employees. In addition, it authorized FRA to prohibit the use of those personal electronic devices that may distract employees from safely performing their duties.

Emergency Order 26:

On, October 1, 2008, FRA issued Emergency Order 26, (“E.O. 26”) which became effective on October 27, 2008. In E.O. 26, FRA found that the use of personal electronic devices by operating employees, while on duty, “...constituted an emergency situation involving a hazard of death...” and imposed prohibitions on such misuse. E.O. 26 explicitly provided that Personal Electronic devices be:

1. Turned off with any earpiece removed from the ear while on a moving train (except in accordance with railroad rules and instructions for radio failure or in an emergency).
2. Turned off with any earpiece removed from the ear when a duty requires any railroad operating employee to:
 - be on the ground;
 - ride rolling equipment during a switching operation; or
 - when another employee of the railroad is assisting in the preparation of the train (e.g. during an air brake test).
3. Used only for voice communication and only when such use does not interfere with the railroad operating employee’s performance of safety related duties.

After the Emergency Order became effective, FRA conducted inspections and included in its report to Congress on May 26, 2010, that during the fourteen months following the issuance of E.O. 26, it had conducted 4,642 observations and identified 180 violations of the Emergency Order. Of those, 36 were recommended for a civil penalty, 33 of which were for the use of personal electronic devices and only three were for the use of railroad supplied electronic devices.

On November 14, 2009, BLET & UTU sent FRA a joint request for reconsideration of certain provisions of the Emergency Order and asked for several adjustments to E.O. 26. First, we requested a consideration in the rule for employees who are deadheading. We urged FRA to regard employees deadheading in trailing units as though they were in passenger or business cars.

We also proposed that cameras and particularly the camera feature of a cellular phone be permitted under certain situations. We argued that prohibiting the use of those type cameras to photograph safety hazards or violations of rail safety regulations could actually diminish safety. Regarding calculators, we noted that a number of safety-critical computations may be required in circumstances when on-board systems fail or are not provided, and to mandate that these be done manually could be even more distracting than the use of an electronic calculator. Finally, we noted that some of our members use Global Positioning Systems (“GPS”) devices in order to verify the accuracy of speed indicators and determining the locations of highway grade crossings, signals and speed restrictions, especially where visibility is reduced or compromised. We requested FRA permit the use of these electronic devices for these purposes.

Notice of Proposed Rule Making

On May 18, 2010, FRA published a Notice of Proposed Rule Making (“NPRM”) in which FRA responded to our requests for consideration by proposing to allow deadheading employees who are not in the operating cab to use electronic devices so long as such use does not interfere with an employee’s personal safety or the performance of their safety-related duties. FRA also proposed allowing cameras but only to document a safety hazard or safety violation. The camera must be a stand-alone device and be turned off immediately after the picture is taken. The NPRM prohibited the locomotive engineer from using a camera in the cab of the controlling locomotive of a moving train. FRA proposed limited use of calculators, citing enforcement problems in determining when a device is used for an “authorized business purpose” and does not interfere with the performance of any employee’s safety related duties. The proposed rule did not permit the use of the camera or calculator function of a cell phone. FRA rejected our request to allow the use of GPS devices, stating that the safety hazard of distraction outweighed the advantage. Notably, the limitation on using cellular telephones, at authorized times, only for voice communications was not included in the NPRM, and absence of this restriction indicates that when the rule goes into effect it will be permissible use cellular phones for text messaging communication during authorized times.

FRA specifically sought comments regarding several additional issues. Particularly: 1) whether violations of 49 CFR part 220 should be a basis for revoking a locomotive engineer’s certification; 2) requiring operating employees to allow the railroads access to the employees’ personal cell phone records, focusing 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; 3) whether an explicit exception should be created to address personal emergency situations and, if so, how it should be expressed; and 4) the six exceptions to using electronic devices FRA contemplated in proposed §220.309(a) through (f) which were:

(a) The digital storage and display function of an electronic device to refer to a railroad rule, special instruction, timetable, or other directive, if such use is authorized under a railroad operating rule or instruction.

(b) An electronic device as necessary to respond to an emergency situation involving the operation of the railroad or encountered while performing a duty for the railroad.

(c) An electronic device to take a photograph or video to document a safety hazard or a violation of a rail safety law, regulation, order, or standard, provided that—

(1) The device’s 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.);

(2) The camera, unless otherwise permitted, is turned off immediately after the documentation has been made; and

(3) If the camera is used in the cab of a moving train, the use is only by a crewmember other than the locomotive engineer.

(d) A stand-alone calculator if used for an authorized business purpose.

(e) A medical device that is consistent with the railroad's standards for medical fitness for duty.

(f) A wireless communication device to conduct train or switching operations if the railroad operating employee is part of a crew assigned to a train that is exempt from the requirement of a working radio under § 220.9(b) when the employing railroad has fewer than 400,000 annual employee work hours.

In response to the NPRM, 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 -- filed joint comments, noting that a growing concern for labor is FRA proposing that the new rules would be “minimum” instead of “uniform” standards:

This part prescribes 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 minimum requirements are met, railroads may adopt additional or more stringent requirements. Emphasis added, See NPRM, Federal Register /Vol. 75, No. 95 /Tuesday, May 18, 2010 / 27687.

Therefore, in addition to the specific requests for comments from FRA, labor felt compelled to address the scope provision of the rule and, in particular, the issue of minimum versus uniform standards. Labor cited the railroads' history misusing their authority to exceed the minimum standards and implement novel ideas that exceed the necessary level of oversight, often resulting in unintended consequences and abuse. We pointed out that, although FRA is willing to revisit its rules to clarify its intentions, the cumbersome and time consuming regulatory process of correcting abuses enables the railroad to inflict significant harm on our members. Unfortunately, FRA rejected our argument and did not modify the proposed language, which will be discussed in more detail below.

Obviously, labor rejected the suggestion that violations of 49 CFR part 220 should be a basis for revoking a locomotive engineer's certification and also rejected the proposal to require railroads to acquire access to the employees' personal cell phone records. We supported an additional exception which would permit cell phones to be used to address personal emergency situations specifically to inquire into or address the safety, health or well-being of themselves or family members. Labor made specific modifications to the proposed language of the six (6) enumerated exceptions proposed, specifically to authorize the utilization of the camera and calculator features of a cellular telephone. Labor also sought a clarification of the definition of an authorized business purpose because we predicted broad abuse by the carriers to address their bottom line under the guise of operational concerns.

The Final Rule

PREAMBLE AND FRA RESPONSE TO OUR COMMENTS

Minimum Standards

The primary concept to keep in mind during the review of this final rule is -- FRA has implemented these rules as minimum standards rather than uniform rules imposed on the railroads and its employees. In doing so, FRA has affirmed the railroads' right to implement any rule that further restricts our members' ability to use electronic devices while they are on duty.

In almost every rulemaking considered by FRA, the railroads have argued that FRA must allow them to implement their own more stringent rules regarding the issues regulated by FRA so long as they meet the minimum safety requirements of the agency's rules. Indeed, many of the rules now under consideration and being developed in the RSAC process contain proposed language that would allow the railroads to adopt and implement more stringent standards. As stated above, labor attempted to have FRA implement uniform standards. However, in the preamble of the final rule FRA wrote, "*[it] declines to refuse railroads the right to impose more restrictive use of electronic devices.*" (Emphasis added) See 75 Fed. Reg. 59587. FRA's position could render the exceptions for using personal electronic devices meaningless, a problem about which we openly warned in our comments on the NPRM.

For example, one of the areas of concern for labor was how our members could maximize the occasions when they could use personal electronic devices. Clearly the imposition of this rule places our members at a disadvantage compared to other employees -- who are not regulated -- in their ability to manage their personal affairs, (i.e. attending to financial matters, scheduling medical appointments or even managing their work schedule and responsibilities). We identified deadheading time as an opportunity for our members to address their personal affairs without jeopardizing safety. In our request for reconsideration of Emergency Order 26, we argued that a crew deadheading should be permitted a degree of latitude to use personal electronic devices, which can be achieved by treating locomotive cabs on trailing units as passenger or railroad business cars are treated. Specifically, since deadheading crews have fulfilled their safety related

responsibilities — and in many cases are not on duty — they should not be restricted to using electronic devices for railroad business purposes only.

FRA responded positively to our concern in the final rule by dismissing AAR’s concern that a deadheading employee would unsafely use their cell phone. Specifically, §220.311 allows employees to use their personal electronic devices as long as such use does not interfere with any employee’s safety related duties and they are not inside the cab of a controlling locomotive. However, by implementing only minimum standards FRA has made it clear that “[] railroads may choose to amend their operating rules to prohibit deadheading employees from using electronic devices.” *Id.* at 59587. Such a standard allows, for all practical purposes, the railroads to undo the legitimate, although limited, exception FRA has authorized in the rule.

Locomotive Engineer’s Certification

Not surprisingly, the railroads supported the proposition that violations of part 220 should be a basis for revoking a locomotive engineer’s certification. In addition, they argued that the pending rule regarding conductor certification should include an identical revocation consequence. AAR commented that it does not understand what argument could be made for not including a violation of this rule as a revocable event in part 240.

In our comments regarding the NPRM, we made a two tiered argument against expanding the universe of revocable violations. First, we pointed out that the events identified as prohibited conduct in §240.117(e) were included there because of the extraordinary number of accidents attributable to violations of those rules, and the existing accident data regarding the use of electronic devices simply does not support a similar conclusion. 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 20 most common engineer-related human factor errors were a cause. 56 Fed. Reg. 28235 (Jun. 19, 1991).

Our second or fallback position was: if FRA decided to include violations of part 220 as revocable events under part 240, an engineer could have his/her certification revoked only for actually using the electronic device. We argued that it is unreasonable to revoke a locomotive engineer’s certification for merely forgetting to turn off a device. FRA seemed sympathetic to that argument in its discussion on that issue. However, it is clear that the agency has not made a final determination on revocation consequences for violations of this rule.

FRA did not include a revocation consequence in the final rule. For the time being, it appears we have held off revocation consequences for violations of part 220. However, it is inevitable that violations of part 220 may eventually be included as prohibited behavior in part 240 and lead to revocation consequences. In the preamble, FRA provided clear indication that they believe it may be appropriate to amend part 240 to include decertification and that the agency simply needed more time to “...consider how it would implement such an amendment.” FRA suggested that it may occur with the

pending conductor certification rule, which is tentatively scheduled to become effective on January 1, 2012. Moreover, the proposed preamble for the conductor certification NPRM specifically requests comments on whether or not part 220 violations should result in decertification consequences. The task statement for the development of the conductor certification rule also specifically requires reconciliation of part 240. If an accident occurs in the meantime in which improper use of a personal electronic device was a causal factor, FRA could move the timetable up for locomotive engineers.

Personal Cell Phone Records

Again the railroads supported this invasion of our privacy and even argued that our cell phone records should be made available to the railroads for any event that could constitute grounds for revoking an employee's certification. We argued that 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 was considering would undoubtedly lead to new and additional abuse. We believe the 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.

Fortunately, FRA decided that requiring railroads to have access to members' personal cell phone records is unnecessary. FRA already has authority to obtain cell phone records and FRA correctly concluded that such a provision is unnecessary for FRA's purposes. Ultimately, though, whether a railroad may – under its more stringent rules – require that we provide access to our personal cellphone records is not prohibited by this rule. It may well be a collective bargaining matter on some properties, and is likely to become a legal question at some point in the future. This is yet one more reason for absolute compliance with FRA's regulation and associated operating rules.

Personal Emergencies

Citing enforcement difficulties, FRA declined to permit individuals an exception for the use of electronic devices in personal emergencies. FRA contends that employees could merely claim an emergency at home as the reason a cell phone was turned on. FRA cited the example of an employee who uses his personal cell phone to call 911 when he was having a heart attack as an occasion that no inspector would recommend a penalty, but otherwise the term "personal emergencies" is largely undefined.

FRA did not address personal security issues. FRA stated that railroads have been able to contact employees for years in the event of emergencies at home. Also, FRA pointed out that its inspectors have discretion in recommending penalties. Astonishingly, FRA expects the railroad to use reasonable discretion in the event of extenuating circumstances but indicated that it will revisit the issue if it proves not to be the case. The BLET should keep whatever documentation we can on a) the railroads' delay or failure to notify employees of emergencies at home and b) their lack of reasonable discretion for employees' personal emergencies.

GPS devices

Railroad supplied GPS devices are not prohibited by the rule. However, FRA has concluded that personal GPS devices create more problems than they solve. The conclusion that distractions caused by the use of a personal GPS device somehow greater than the distraction caused by a railroad supplied GPS is perplexing. In any event, FRA does not believe that personal GPS devices enhance safety significantly. FRA cited part 240, which requires locomotive engineers to be familiar with the physical characteristics of the routes over which they operate. The rule prohibits personal GPS devices.

Cameras

Labor's comments to FRA in the NPRM included a request that FRA allow the camera feature of cell phone be used to document hazards or violations of railroad regulations. Labor suggested that this could be used safely if the same conditions that were outlined for stand-alone cameras were applied. Citing its experience with cell phones, and how they account for the vast majority of electronic device distraction accidents, FRA rejected our proposal.

In a transparent effort to further conceal its safety violations, AAR urged FRA to remove the camera exemption from §220.309 entirely. The railroads claimed that taking photographs was unnecessary because railroad employees have ample means of reporting safety issues without cameras. Even more absurd was the railroads' argument that photographs of safety hazards, taken by employees, are a security risk. In other words, terrorists are excitedly waiting for employees to post photographs of defective switches. Keeping in mind the minimum standard provision, we will probably see most, if not all railroads, implement an operating rule prohibiting employees from using cameras at any time.

FRA discussed the use of cameras at length in its preamble. For personal cameras, the bottom line is that multi-functional electronic devices that include a camera feature are prohibited. Stand-alone cameras will be permitted at the authorized times as long as 1) they are not used by the locomotive engineer on a moving train, 2) they are used only to photograph a safety hazard or violation of safety law regulation/order, and 3) turned off immediately after use.

The rule is more lenient for railroad supplied cameras and authorizes the use of multi-functional electronic device so long as it is used for an authorized business purpose (discussed below) which has been submitted to and approved by FRA. The rule prohibits the use of videos or the video feature of a camera or multi-functional electronic device for personal and railroad supplied cameras.

Exceptions for Other Electronic Devices to Document Hazards

Labor requested a specific exemption for the use of certain electronic devices that are useful in detecting hazards that are not visible, such as toxic/poisonous gasses, extreme temperatures or even radiation. In the absence of a specific exemption to use electronic devices that detect those hazards, labor asked for a "good faith" challenge provision in the locomotive safety standard rules for such devices.

FRA responded by clarifying that the definition of electronic devices does not include those types of devices and rejected the “good faith challenge” approach to documenting defective suggestion as because it is beyond the scope of the rule making. Although curiously they are still considering amending part 240, which is only part of this rule making because FRA has sought comment on it.

§220.5 Definitions

I have not discussed all of the definitions that are in the final rule but only those that are either new or are necessary to understand the discussion later.

Electronic Device

Electronic devices fall into two categories; railroad supplied electronic device[s], which are electronic devices supplied by the railroad for an authorized business purpose[s], which is discussed below, and Personal electronic device[s], which is defined as devices not provided by the railroad. In addition, a railroad supplied electronic device that is used for anything other than an authorized business purpose is considered a personal electronic device for purposes of enforcing this rule. The definition broadly identifies the devices our members are most likely to use and includes a catch-all sentence that prohibits the use of any electronic device that entails the risk of distracting an employee from their safety related duties. It is unclear from reading the text whether or not FRA considers voice recording devices in this definition. However, until we get some clarifications, the catch-all provision of the definition is so vague and open to subjective interpretation that we should advise our members that it could be construed as any device that has an on/off switch depending on when, where and how it is used.

Authorized Business Purpose

When we submitted our comments on the NPRM, we cautioned FRA that we anticipated that front line managers would abuse the authorization and start requiring our members to discuss train delays or make reports on unrelated operational concerns from previous duty tours. FRA has partially addressed our concern and defined the term as “*a purpose directly related to the tasks that a crewmember is expected to perform during the current tour of duty as specified by the railroad in writing.*” (Emphasis added), which requires the railroads to establish their authorized business purposes in advance. In addition, if a railroad wants to include taking photographs or videos as an authorized business purpose, that purpose must be specifically approved by FRA.

Consistent with FRA’s general approach to rule making, the prohibitions on the use of railroad supplied electronic devices are most strictly imposed on the locomotive engineer. A locomotive engineer operating the controls of a train is prohibited from using any electronic device – other than the locomotive’s electronic control systems, such as radios, cab signals or PTC systems – even those that the railroad has supplied for authorized business purposes, while: 1) the train is moving, 2) a member of the crew is on the ground or riding rolling equipment during switching, 3) any railroad employee is assisting in the preparation of the train for movement. Other employees may use a railroad supplied electronic device for an authorized business purpose in the operating

compartment of a train only if it does interfere with a railroad operating employee's performance of safety related duties, a safety briefing is conducted that includes all crew members and all crew members agree that is safe. Finally, beginning on December 27, 2010, the rule requires a written plan, instruction and examination for the affected employees and their supervisors explaining what constitutes an authorized business purpose.

In Deadhead Status

In response to our comments, FRA added this definition and made it consistent with the definition of Deadheading in 49 CFR 228.5. The definition also incorporates the accepted practice that employees awaiting transportation are also considered "in deadhead status." In §220.311, FRA authorized the use of electronic devices while in deadhead status under certain conditions. A clear understanding of when our members are in such status is essential to protecting them from the consequences of violations of the rule.

Medical Devices

The rule defines medical devices and §220.309(e) authorizes the use of electronic medical devices. FRA made it clear, in the preamble that electronic medical devices such as hearing aids and blood sugar monitors are not prohibited by this rule and the definition is sufficiently broad to allow for reasonable protection for our members to address their health concerns without fear of losing their jobs. The rule requires that the medical device is used consistent with the railroad's standards for medical fitness for duty. Although FRA's medical standards have not yet been developed and implemented, it is reasonable to anticipate that using a prescribed medical device to satisfy those standards will be permitted by this rule when FRA's medical standards are eventually implemented.

§220.301 Scope, clarifies that the rules applies to the "inappropriate use of electronic devices" it does not include the radios or the use of electronic devices in accordance with the railroad's operating rules.

§220.302 Operating rules implementing the requirements of this subpart, is self-explanatory.

§220.303 General use of electronic devices, prohibits operating employees from using electronic devices at any time if it interferes with the safety duties of another operating employee. It also prohibits any individual from using an electronic device in the cab of controlling locomotive if it interferes with the performance of safety duties of operating employees.

§220.305 Use of personal electronic devices, is drawn directly from E.O. 26 and maintained all but one of the general prohibitions. The final rule requires that operating employees have personal electronic devices turned off and the earpiece removed when: 1) on a moving train and 2) when any crew member is on the ground or, 3) when any crew member is riding rolling equipment during switching or, 4) when other employees are

preparing the train for departure. There is an exception for using electronic devices on moving trains for employees in deadhead status which is explained below in §220.311.

During the evaluation period – October 27, 2008 through August 2010 – FRA identified 249 instances where E.O. 26 may have been violated and recommended enforcement action in 56 of those instances. In 49 of those cases employees were using electronic devices, had it turned on or did not have the earpiece removed. All but one (48 of 49) of those cases was for employees using personal cellphones. On that basis, FRA has made this section more restrictive than the section governing the use of railroad supplied electronic devices.

The restriction in E.O. 26, for using electronic devices “[...]only for voice communication...” was not adopted in the final rule. Accordingly, at the permissible, times the use of the text messaging feature of a cell phone is allowed. It is essential for our members to understand that the new rule contains the catch all provision in §220.303 which prohibits the use of electronic devices at any time such use would interfere with the employee’s or another operating employee’s performance of safety related duties.

§220.307 Use of railroad-supplied electronic devices, Authorizes the use of railroad supplied electronic devices for authorized business purposes (above). It requires railroads to identify, in writing, when and why an employee may use their electronic devices. Also the railroads are required to acquire approval from FRA for authorized business purposes that include taking photographs or videos.

It prohibits the locomotive engineer from using a railroad supplied electronic device during the same four times identified in §220.305: 1) on a moving train, and 2) when any crew member is on the ground, or 3) when any crew member is riding rolling equipment during switching, or 4) when other employees are preparing the train for departure.

It permits operating employees not in deadhead status,¹ (crew members) to use railroad supplied electronic devices, at those restricted times, after they have completed a job briefing with all crew members and they concur that it is safe to use the device. Presumably, this will allow a conductor to use a railroad-supplied cell phone to make arrangements for deadhead transportation while a train is moving; otherwise, the crew would have to bring a train to a stop to make such arrangements from a personal electronic device.

§220.309 Permitted uses; exceptions to other restrictions, identifies the devices and circumstances when an operating employee may use certain electronic devices. The threshold determination is that the use of the device must not interfere with any employee’s safety related duties. Essentially, it is permissible for operating employees to:

¹ The restrictions on employees using electronic devices in the operating compartment are similar but are defined later in the rule in §220.311.

- 1) Use digital storage devices to look up operating rules, special instructions, timetables or other directives.
- 2) Use a cell phone to report an emergency involving railroad operations.
- 3) Use a “stand alone” calculator for authorized business purposes
- 4) Use a medical device in connection with the railroad’s medical fitness for duty requirements.
- 5) Use a wireless communication device (cell phone) on railroads that are exempt from the requirement to have working radios on their equipment in accordance with 49 CFR §220.9².
- 6) Cameras are given special treatment under the rule. In addition to the requirement for the railroad to acquire approval from FRA, the use of cameras is further restricted to documenting safety hazards or violations of safety law or regulation.

The camera feature of a cell phone is specifically is not included in this exception and is therefore prohibited, unless the cell phone is railroad supplied for an authorized business purpose. The use of the camera feature on a personal cell phone is prohibited. The camera must be turned off immediately after it is used. The locomotive engineer is prohibited from using a camera while on a moving train.

§220.311 Railroad operating employees in deadhead status, is a new provision that was included in response to our original request for reconsideration to E.O. 26. This section establishes that crews deadheading may use personal electronic devices as long as they are not in the cab of the controlling locomotive and such use does not compromise the safety of any operating employee including their own, and does not interfere with the performance of the safety duties of any operating employee. In addition, this section makes it clear that a deadheading employee in the cab of the controlling locomotive is prohibited from using any electronic devices and they must have the devices turned off and the earpiece removed during the four prohibited times.

§220.313 Instruction, requires the railroads to provide instruction and examination to their employees covered by this rule and each supervisor of those employees on their operating rules which FRA requires in §220.302. The railroad is required to establish a written program of instruction by December 27, 2010. The program must include when the employees are required to have their personal devices turned off with the earpiece

² 49 CFR 220.9, authorizes exemptions from the requirement to have working wireless communications in the occupied controlling locomotive of a train for short line railroads (less than 400,00 annual employee work hours) that do not transport passengers, or operate at speeds greater than 25 mph, or engage in joint operations with a railroad that is not exempt, or the speed on tracks within 30 feet of passenger tracks exceeds 40 mph, or where the joint operation is over track with an authorized speed greater than 25 mph railroads.

removed, when they may use railroad supplied devices and what constitutes an authorized business purpose and the consequences for non-compliance with both FRA's regulations and the railroads more stringent rules.

No employee may be permitted to perform any work that is restricted by this rule after March 28, 2011, unless they have been instructed in accordance with the requirement of this section within the previous three years. The railroads are required to keep records of the training and examination of its employees for three years.

§220.315 Operational tests and inspections; further restrictions on use of electronic devices, requires the railroads to conduct operational testing for compliance with this rule. This section prescribes that the operational testing required by part 217 be revised to include this subpart. This section specifically prohibits the railroad from calling the personal or railroad supplied electronic used by the employee during the four prohibited times. In addition to the other potential penalties for violation of other provision of this rule, supervisors who call the tested employee during operational test during the prohibited times are subject to civil penalties.