

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA—2009—0044:
EMERGENCY ESCAPE BREATHING
APPARATUS STANDARDS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR),¹ on behalf of itself and its member railroads, submits the following comments in response to FRA's notice of proposed rulemaking proposing standards for emergency escape breathing apparatus (EEBA).² AAR has concerns with several aspects of FRA's proposal.

Section 413 of the Rail Safety Improvement Act of 2008 (RSIA) requires that DOT mandate EEBA's for crewmembers. However, to the extent FRA has discretion, it must exercise that discretion carefully. FRA estimates the ten-year costs to be between \$73.9 million and \$81.9 million, while it estimates the potential benefits to be \$13.5 million. AAR questions the estimate of potential benefits inasmuch that employees, if exposed to the chemicals of concern, will be able to don EEBA's in sufficient time following a release. However, assuming, *arguendo*, that FRA's estimate of benefits is correct, the costs of the proposal far outweigh the benefits. Consequently, to the extent FRA has discretion, it should seek to reduce the costs to industry.

**I. The Rule Should Not Encompass
Asphyxiants Other Than PIH Materials**

The proposed rule requires that railroads provide EEBA's when transporting "asphyxiants" or PIH materials. Section 413 of the RSIA applies to "hazardous

¹ AAR is a trade association whose membership includes freight railroads that operate 72 percent of the line-haul mileage, employ 92 percent of the workers, and account for 95 percent of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

² 75 Fed. Reg. 61,386 (October 5, 2010).

materials that would pose an inhalation hazard in the event of release.” By proposing to apply the EEBA requirement to “asphyxiants,” FRA has chosen to interpret the phrase “inhalation hazard” broadly, including substances such as carbon dioxide.

Clearly, there are many substances that would cause asphyxiation if a person were inhaling that substance and no oxygen. However, there is no indication that Congress intended to require EEBA's for all such substances. AAR agrees with FRA that the genesis for section 413 were the Macdona and Graniteville accidents, which involved PIH materials. There is no record of any rail-related fatality attributable to the inhalation of non-PIH substances and no indication that Congress, in enacting section 413, intended to cover any substances other than PIH.

FRA's cost-benefit analysis indicates that the agency should not seek to expand the scope of the EEBA rule beyond the statutory mandate. With the costs exceeding the benefits by such a substantial amount, there is no justification for doing so. If FRA were to apply the EEBA requirement to asphyxiants, it would be doing so as a matter of discretion. FRA lacks justification for such an exercise of discretion.

By including asphyxiants, FRA would significantly increase the burden imposed on industry. There are approximately 100,000 shipments of TIH annually. There are approximately 200,000 shipments of asphyxiants that are not classified as TIH.

II. The Inspection And Recordkeeping Requirements Are Overly Burdensome

FRA proposes to require a pre-trip inspection of EEBA's. AAR suggests an alternative approach to inspections.

The appropriate inspection procedure should depend on how a railroad chooses to deploy EEBA's. AAR agrees a pre-trip inspection is appropriate if a railroad chooses to issue an EEBA directly to an employee, either permanently or for a trip. As FRA recognizes in the preamble, alternatively a railroad could choose to mount EEBA's permanently in locomotive cabs. In such cases, it should be sufficient to make the EEBA inspection part of the calendar-day inspection. Requiring an inspection before each trip is unnecessary.

FRA should clarify that a pre-trip or calendar-day inspection consists of a quick visual inspection to ensure that the EEBA's appear to be in working order. EEBA's are sealed in air-tight containers. Certainly FRA does not expect an employee to break the seal to inspect the EEBA's.

Most of the proposed recordkeeping requirements are unnecessary. AAR does not object to records of inspections performed pursuant to manufacturer instructions, but the requirement in proposed 227.207(b)(2) that records of pre-trip inspections be kept for one year would provide no safety benefit. If FRA adopts AAR's proposal for daily inspections when EEBA's are permanently installed in locomotive cabs, keeping records of those inspections as part of the daily inspection report required by 49 C.F.R. section 229.21 (which requires that the record be kept for 92 days) would not be particularly burdensome since daily inspection records are already maintained. However, in no event should railroads or their employees be burdened with having to keep new records of pre-trip inspections. Those records would not yield useful information.

Accordingly, AAR suggests that proposed 227.207(a)(1) and (b) and proposed 227.215(a)(2) be amended as follows.

1. 227.207(a)(1):

(1) Procedures for ~~performing and recording a pre-trip inspection of each EEBA that is required to be provided on a locomotive being used to transport an asphyxiant or a PIH material and procedures for cleaning, replacing, or repairing each required EEBA, if necessary, prior to its being provided under § 227.201(a).~~

2. 227.207(b):

Inspection procedures and records. (1) A railroad's procedures for ~~pre-trip~~ and periodic inspections of EEBA's shall require that the following information about each ~~pre-trip and~~ periodic inspection be accurately recorded on a tag or label that is attached to the storage facility for the EEBA or kept with the EEBA or in inspection reports stored as paper or electronic files:

- (i) The name of the railroad performing the inspection;
- (ii) The date that the inspection was performed;
- (iii) The name and signature of the individual who made the inspection;
- (iv) The findings of the inspection;
- (v) The required remedial action; and

- (vi) A serial number or other means of identifying the inspected EEBA.
- (2) A railroad shall maintain an accurate record of each ~~pre-trip~~ and periodic inspection required by this section and retain each of these records for one year.

- 3. 227.215(a)(2): delete the phrase, "Except for records of pre-trip inspections of EEBA's under § 227.207,."

III. AAR Supports Conducting Inspections Pursuant To Manufacturer's Instructions

Proposed subsection 227.207(a)(2) provides that railroads are to conduct inspections "in a manner and on a schedule in accordance with the manufacturer's instructions." AAR supports this requirement. There is no reason to depart from the manufacturer's instructions. The manufacturer has the knowledge of what is necessary for its EEBA's.

IV. The Requirement To Document The Adequacy Of The EEBA Is Unnecessary

Proposed subsection 227.203(c) requires a railroad to document the adequacy of the EEBA. However, proposed subsection 227.203(b) requires that the railroad use an EEBA certified by National Institute for Occupational Safety and Health or the International Organization for Standardization. If the EEBA is certified, no further showing of the adequacy of the EEBA should be necessary. Put another way, what additional showing of the adequacy of the EEBA does FRA expect for a certified EEBA?

Subsection 227.203(c) should be deleted.

V. FRA Should Provide A Limited Exemption for Foreign Crews

There is precedent for FRA exempting limited foreign operations from regulatory requirements. FRA's regulations addressing alcohol and drug use contain an exemption for foreign railroad operations extending up to ten miles in the U.S.³ AAR urges FRA to include such an exemption here. It makes no sense to require a foreign railroad to undertake the considerable expense of developing an EEBA program for such limited operations.

³ 49 C.F.R. § 219.3(c).

VI. Miscellaneous

Proposed paragraph 227.209(b)(3) requires instruction on what to do if the EEBA malfunctions. Exactly what does FRA envision will be taught other than to leave the scene as quickly as possible? AAR suggests this paragraph be deleted.

Proposed subsection 227.207(d) provides that railroads must maintain records of the “return, maintenance, repair, or replacement” of EEBA’s. AAR’s understanding of this paragraph is that the can railroads arrange for EEBA suppliers to maintain these records. AAR understands that if such an arrangement is made, the railroad still is responsible for any failure to keep such records.

Proposed paragraph 227.211(b)(1) requires that a railroad identify by name the employee managing the railroad’s EEBA program. As the specific individual in charge of the EEBA program could change frequently, AAR suggests deleting the requirement that the individual be identified by name. There is no reason to do so.

The UTU Discussion Document included in the *Federal Register* notice suggests that FRA require EEBA’s be placed on all locomotives operating over a route on which hazardous materials that pose an inhalation hazard are transported. FRA has not included such a requirement in the NPRM, for good reason. The statutory mandate does not go so far and given the disparity between costs and benefits, there is no logical basis for extending the statutory mandate further. UTU claims that it will be a “logistics nightmare” to ensure EEBA’s are on the correct train, but the railroads are confident they will be able to comply with the statutory mandate as written.

The *Federal Register* notice states that UTU “expressed a strong desire for regular, hands-on training.”⁴ FRA should not mandate a specific method of training. FRA should afford railroads the flexibility to use whatever methods they deem appropriate to train their employees as long as the employees are sufficiently trained. Should a railroad develop a training program that sufficiently trains employees without the need for hands-on training, FRA should not object. It might be as feasible to train an employee on the procedure for putting on an EEBA using methods other than hands-on training as it is to instruct an airline passenger on how to don an oxygen mask, which is done without hands-on training.

⁴ 75 Fed. Reg. 61,393.

Thank you for considering these comments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael J. Rush".

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