

**BEFORE THE
FEDERAL RAILROAD ADMINISTRATION**

**DOCKET NO. FRA-2009-0044:
EMERGENCY ESCAPE BREATHING APPARATUS STANDARDS
FINAL RULE**

**PETITION FOR RECONSIDERATION
FROM THE ASSOCIATION OF AMERICAN RAILROADS AND
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

Pursuant to 49 C.F.R. § 211.29, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRRA) (jointly referred to as “the Associations”), on behalf of themselves and their member railroads, petition the Federal Railroad Administration (FRA) for reconsideration of the deadlines for compliance for Class I, Class II and Class III railroads of the Emergency Escape Breathing Apparatus Standards (EEBA) final rule.¹

The final rule mandates that Class I and Class II railroads must comply with the rule within 12 months of the rule’s effective date, or March 26, 2025, and that Class III railroads must comply with the rule within 18 months of the rule’s effective date, or September 26, 2025. 49 C.F.R. § 227.217. Since the rule’s publication, the Associations have been informed by their members that the major manufacturers of EEBA’s, including 3M, Ocenco, and Semmco, have

¹ AAR is a non-profit trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRRA is a non-profit trade association representing the interests of approximately 600 short line and regional railroad members in legislative and regulatory matters. Short lines operate 47,500 miles of track in the United States, or approximately 29% of the national freight network, touching in origin or destination one out of every five cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network. 89 Fed. Reg. 5,113 (Jan. 26, 2024).

indicated that they will need a significant lead time to ramp up production for railroads wishing to purchase EEBA's that fulfill the requirements of the final rule. At least one manufacturer told a Class I railroad that it will take approximately 12 months to receive the quantity of EEBA's that would be needed to comply with the minimum provision requirements in 49 C.F.R. § 227.201(a). This estimate was based on the railroad being the first customer to place an order. The lead time for orders that follow the first order will be substantially longer even if manufacturers can increase manufacturing capacity, as current production levels are insufficient to meet railroad demand based on the rule's requirements. Moreover, Class II and Class III railroads, the majority of whom are classified as small businesses, do not have the market power that larger companies have to purchase EEBA's. As a result, Class II and Class III railroads will experience additional delays because the larger orders will be prioritized by manufacturers of EEBA's. This lag in time for railroads to be able to acquire EEBA's makes it functionally impossible for a railroad to incorporate the other elements of the rule, including the requirement to create a program for the inspection and maintenance at 49 C.F.R. § 227.207 and the requirement to implement a general EEBA program at § 227.221 and train its employees on the program at § 227.209 pursuant to the current timeframe set forth in § 227.217. The new training requirement would apply to more than 50,000 train and engine service employees; however, railroads cannot train these employees on how to "inspect, put on, remove, and use the EEBA, and how to check the seals of the EEBA" if they do not have EEBA's in their possession.²

The final rule allows railroads to choose how to deploy EEBA's. There are a host of factors that go into that decision. Railroads necessarily will make individual choices on the deployment of EEBA's. Some railroads may decide to mount EEBA's in locomotive cabs based

² 49 C.F.R. § 227.209(b)(4).

on manufacturer representations that mounting can significantly increase the longevity of the device. Mounting EEBA's in locomotive cabs will necessitate the development of new interchange rules and require uniform packaging specifications to ensure that the EEBA's from different manufacturers safely fit in the locomotive mounting brackets. Mounting EEBA's in locomotive cabs also creates complications in implementation because each railroad will need to train its employees on the devices it has purchased and the devices from other manufacturers that have been purchased by different railroads whose locomotives are interchanged with the railroad. This is because the commercial products that are available to railroads have differing design specifications based on the manufacturer, and those design specifications will continue to be different unless the industry implements design standards, which will take time and result in additional delays in acquiring the devices.

In the preamble, FRA states that “given the length of time since the publication of the 2008 RSIA mandate, 2010 NPRM, FRA’s issuance of guidance in 2016, and the 2023 SNPRM, railroads have been on notice about the need to provide EEBA's and the lengthy timelines from the 2010 NPRM are no longer necessary.”³ This statement mischaracterizes the timeline, as the 2016 guidance document did not mandate purchasing of EEBA's – rather, it provided guidance to railroads that might choose to develop and implement an individualized EEBA program. While the guidance document highlights factors to consider when selecting an appropriate EEBA and explains various components to evaluate when developing an EEBA program, it did not require railroads to implement a program or acquire thousands of devices on a very compressed timeframe. Given the 16-year gap between the passage of the statutory mandate and the publication of FRA’s final rule and given that FRA’s own analysis shows that EEBA's provide

³ Id. at 5,121.

minimal safety benefits at an extremely high cost, it is specious for FRA to argue that railroads should have acted in the interim because they were somehow “on notice” that FRA would eventually require railroads to supply EEBA’s.⁴ Furthermore, the requirements proposed in the 2023 SNPRM were substantively different than what was proposed in 2010.⁵ These factors taken together resulted in substantial uncertainty with respect to when or if the rule would be finalized and what the final rule would look like. Therefore, there is no rational basis to suggest that railroads should have started procuring EEBA’s in advance of the final rule. Indeed, Class II and Class III railroads, most of whom are classified as small businesses and with limited funds, are simply not in a financial position to purchase volumes of items in advance based upon a proposal in an SNPRM. They are, for the most part, only able to base their capital purchases on the requirements of a final rule.

In light of the limitations of the known suppliers of EEBA’s and the complications associated with implementation of the final rule, the Associations urge FRA to provide an additional 12 months for Class I, Class II and Class III railroads to comply with the EEBA final rule.

⁴ FRA’s Final Rule Regulatory Impact Analysis (RIA) dispenses with an analytical approach to benefits assessment in favor of generalized and speculative statements concerning FRA’s belief that EEBA’s will potentially have future benefits because of several hypothetical situations. However, there is nothing in the Final Rule RIA that would suggest the benefits identified by FRA come close to offsetting the cost of supplying EEBA’s. The accident history is just not there to support such a conclusion. Indeed, while FRA’s Final Rule RIA does not attempt to quantify benefits, its own analysis at the SNPRM stage suggested that the costs of the rulemaking exceeded the benefits by as much as 1690 to 1.

⁵ As an example, the 2010 NPRM proposed requiring that devices be certified by NIOSH pursuant to 49 CFR part 84 or by the International Organization for Standardization pursuant to ISO-23269-1:2008(E). The final rule expands the types of devices allowed to also include EEBA’s that are certified under the English language versions of the European standards (ENs) for escape respirator devices, specifically BS EN 13794:2002 and BS EN 1146:2005. Another example is that the 2010 NPRM proposed applying the EEBA requirement to PIH materials and asphyxiants, while the final rule only applies to PIH materials. These types of changes are substantial, but FRA seems to discount the impact those changes on the railroads’ decision-making process.

Respectfully submitted,



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