EXHIBIT 3-J

Docket No. DCA-08-MR009

NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594

Federal Railroad Administration
Emergency Order 26

considered environmentally acceptable for supersonic flight over land.

The FAA is leading a panel discussion entitled, "State of the Art of Supersonics Aircraft Technology—What has progressed in science since 1973?" The purpose of this panel session is to raise public awareness on advances in supersonic technology, and for the FAA, the National Aeronautics and Space Administration (NASA), and industry to get feedback from interested persons.

Public involvement is essential in any future definition of an acceptable new standard that would allow supersonic flights over land. We anticipate that this will be the first of many meetings informing the public on developments in the research of shaped sonic booms and other technical and environmental challenges that need to be addressed in developing a new supersonic airplane.

The FAA's presentation and panel discussion will take place on Friday, October 24, 2008, as part of the O'Hare Noise Compatibility Commission Symposium. It will be held at the Hyatt Rosemont Hotel, 6350 N. River Road, Rosemont, Illinois.

More information about the O'Hare Noise Compatibility Commission can be found at its Web site, *www.oharenoise.org.*

Issued in Washington, DC, on September 24, 2008.

Lynne Pickard,

Acting Director of Environment and Energy.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[FRA Emergency Order No. 26, Notice No. 1]

Emergency Order To Restrict On-Duty Railroad Operating Employees' Use of Cellular Telephones and Other Distracting Electronic and Electrical Devices

SUMMARY: This is an emergency order to restrict on-duty railroad operating employees from improperly using cellular telephones and other distracting electronic and electrical devices.

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–6255); or Ann M. Landis, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6064).

Introduction

The Federal Railroad Administration (FRA) of the United States Department of Transportation (DOT) has determined that public safety compels issuance of this emergency order restricting the improper use by railroad operating employees of certain electronic and electrical devices. Based on the historical record, rail passenger transportation in the United States is an extremely safe mode of transportation. However, recent incidents, including one that has claimed 25 lives, have caused DOT and FRA to have very serious concerns about the safety of the improper usage of cellular telephones (cell phones) and other electronic and electrical devices.

Authority

Authority to enforce Federal railroad safety laws has been delegated by the Secretary of Transportation to the Federal Railroad Administrator. 49 CFR 1.49. Railroads are subject to FRA's safety jurisdiction under the Federal railroad safety laws, 49 U.S.C. 20102, 20103. FRA is authorized to issue emergency orders where an unsafe condition or practice "causes an emergency situation involving a hazard of death or personal injury." 49 U.S.C. 20104. These orders may impose such "restrictions and prohibitions * * * that may be necessary to abate the situation." (*Ibid.*)

Background

Although most railroads have rules or procedures in place that prohibit or restrict the use of electronic devices such as cell phones and personal digital assistants (PDAs), these company rules and procedures have not proven effective in preventing serious train accidents caused by the unsafe use of such devices. That became clear only very recently in a decade-long course of FRA regulatory activity.

FRA Activity

When FRA amended 49 CFR Part 220-Radio Standards and Procedures on January 4, 1999, it was re-titled to "Railroad Communications," to reflect its coverage of other means of wireless communications such as cell phones, data radio terminals, and other forms of wireless communications used to convey emergency and need-to-know information. The revisions to Part 220 were the result of recommendations by the Railroad Safety Advisory Committee's (RSAC) Working Group, which consisted of a diverse group of subject matter experts representing a wide array of railroad industry stakeholders.

In its deliberations, the Working Group examined extensive safety data, discussed how to improve compliance with existing Federal regulations on radio standards and procedures, and considered whether to mandate radios and other forms of wireless communications to convey emergency and need-to-know information. FRA sought comments on whether non-radio wireless communications procedures paralleling the radio procedures in Part 220 should be adopted for cell phones and other wireless devices. Particularly, FRA wanted to know whether on-radio wireless communications had the same opportunities for misunderstanding as radio transmissions and how such procedures would be enforced. After reviewing the comments, FRA decided, at that time, not to promulgate non-radio wireless communications procedures, based primarily on the fact that the Working Group did not consider in depth how to ensure the accuracy and completeness of non-radio wireless communications. Accordingly, in the final rule, FRA addressed only the testing and failure of non-radio wireless communications equipment (see 49 CFR 220.37 and 220.38, respectively).

However, FRA emphasized in the preamble to the final rule that the procedures in section 220.61 (radio transmission of mandatory directives) should be followed even when a cell phone or other form of wireless communication is used to transmit mandatory directives. FRA stated at the time that it reserved the right to revisit the issue of non-radio wireless communications procedures, if necessary.

On March 17, 2004, FRA met with the National Transportation Safety Board (NTSB or Safety Board) at what they termed a "Safety With A Team" (SWAT) meeting. As the result of Safety Recommendation R–03–1, FRA told the Safety Board that it had instructed its inspectors to increase its monitoring of unauthorized use of cell phones, but that enforcement of any regulation in this area would be challenging. FRA stated that it was in the process of gathering copies of enhanced railroad operating rules that strengthened the restrictions railroads placed on the use of cell phones and that it would review all of these rules and procedures governing cell phone use to look for gaps, and consider options, to include the issuance of a FRA Safety Advisory.

FRA also stated to the Board at the SWAT meeting that it would discuss the subject of cell phone usage with members of the full RSAC, and determine what actions, if any, FRA

should pursue in relation to this safety recommendation. At the full RSAC meeting conducted on April 27, 2004, FRA asked that the members of all organizations come to the next full RSAC meeting prepared to discuss what their current instructions were for cell phone use, whether they need to be improved, and whether this is a subject that should be tasked to a new RSAC Working Group. At this time, FRA explained to the Board that this new technology (cell phones and other wireless forms of communication) aids in reducing overcrowding of radio frequencies and that FRA wants to take advantage of the benefits that cell phones provide to the railroad industry.

Also at this time, FRA contacted the General Code of Operating Rules (GCOR) Committee, concerning the enhancement of GCOR Rule 1.10 (use of electronic devices) in the next edition of the GCOR, due to be published on April 3, 2005. The GCOR Committee, however, decided not to amend the rule at that time. Rather, their position was that each member road should address the cell phone issue in its individual special instructions.

In a letter to the NTSB, dated May 26, 2004, FRA subsequently provided copies of all relevant railroad operating rules and procedures relating to the use of cell phones and other wireless communication devices. FRA's initial review of this material indicated that, while there is some disparity with respect to the detail of prohibitions concerning cell phone use, all railroads canvassed did have a rule that prevented and/or limited cell phone use.

In the above-referenced letter to the Safety Board, FRA recounted its initial response to safety recommendation R–03–01, that it had changed the title of Part 220 to "Railroad Communications" to reflect coverage of other means of wireless communications such as cell phones, data radio terminals, and other forms of wireless communications used to convey emergency and need-to-know information. FRA also reminded the Board that the revisions to Part 220 that were effective in 1999 were the result of a recommendation by the full RSAC. Further, FRA acknowledged that there are many distractions in the course of day-to-day train operations that could momentarily divert a crewmember's attention, and that cell phones were just one of those mentioned. FRA still believed, at that time, that the operating rules of the railroad adequately addressed these situations and that responsibility for compliance rested with company officers and supervisors. Therefore, FRA concluded that the railroads' enforcement of their operating rules governing cell phone use was sufficient to address the issue without the intrusiveness of Federal intervention.

In a letter from NTSB to FRA, dated August 19, 2004, the Board classified safety Recommendation R–03–1 as "Open-Acceptable Response."

At the full RSAC meeting on September 22, 2004, members came prepared to discuss the issue of cell phone use, whether their current instructions were for cell phone use, whether they needed to be improved, and whether this was a subject that should be tasked to a new RSAC Working Group. This is an issue that appears in all forms of transportation. FRA pointed out that the proliferation of cell phone technology has now made the devices a necessity, also noting, though, that there are many examples of how the use of these devices by railroad employees in locomotive cabs of moving trains can be distracting.

FRA still believed, however, that Federal intervention in this area was not warranted at that time. FRA also acknowledged at a previous full RSAC meeting that, by the same token, there are many other distractions in the course of normal everyday train operations that could divert a crewmember's attention, for which there are likewise no Federal regulations, pointing out that some of these are far more invasive than cell phone use.

The RSAC members present at the meeting unanimously restated that virtually all of them restrict cell phone use in one form or another, but also acknowledge that the use of this, and related devices, allows more effective communication among employees, and that many railroads even provide cell phones to their employees. It was also mentioned that redundant communication devices are now required by Federal regulation (Part 220) and that cell phones are one acceptable example. The consensus of those members present was that it was a complex issue and that they were not yet prepared to consider a Federal regulation in this area. Notwithstanding, while FRA had not yet decided what course of action it would follow, FRA agreed to reexamine current railroad operating rules and instructions on cell phone use and develop from that review what "best practices" emerge. FRA would then circulate a "best practices" document among RSAC members for comments before forwarding it on to the NTSB.

In a letter to NTSB, dated August 18, 2006, FRA provided the Safety Board with an update on the status of its recommendation R–03–01 with respect to cell phone use in the railroad industry. FRA noted that NTSB had renewed its interest in the use of cell phones by railroad employees as the result of a collision between two BNSF freight trains near Gunter, Texas, on May 19, 2004. NTSB had determined that 25 calls were made by crewmembers from both trains during the trip and up to the time of the collision, and that 22 of those calls were of a personal nature. FRA's update indicated to the Board that it had not yet decided what final course of action it would follow, but that, with the assistance and cooperation of the railroad's operating rules departments, it was still developing a "best practices" document. It was subsequently decided to task the RSAC Operating Rules Working Group with developing this document.

At a meeting of the Operating Rules Working Group on September 27–28, 2007, held in Fort Worth, Texas, also attended by a representative of the NTSB, it was discussed and agreed that the railroad industry, with a representative to facilitate the process from the FRA, a "best practices" operating rule would be developed, and that if the industry as a whole could adopt and enforce it, that approach would be considered by the Board in lieu of Federal intervention.

At the next meeting of the GCOR Committee, on November 14–15, 2007, also attended by rules officers from NORAC and other major eastern railroads not signatory to the GCOR, and the ASLRRA, and facilitated by a representative from FRA, just such a "best practices" operating rule was developed and agreed upon by the GCOR Committee, the ASLRRA, NORAC, and other railroads present.

At a meeting of the Operating Rules Working Group held in Washington, DC, on January 17–18, 2008, a draft of the "best practices" operating rule that was developed by the industry, was shared with the Working Group and discussed at length. It was decided at that meeting that while the proposed rule was acceptable, it needed further enhancements. The suggestion was made that FRA develop a Safety Advisory which would contain these additional enhancements, some of which were proposed at the meeting. FRA accepted this task and subsequently developed a proposed Safety Advisory on the use of cell phones and similar wireless communications devices by railroad operating employees.

At a meeting of the Operating Rules Working Group held in Grapevine,

Texas, on May 21–22, 2008, the proposed Safety Advisory on cell phone use was discussed and the document was further refined and enhanced to include many valuable suggestions. A final draft was then prepared for discussion at the next Working Group meeting.

In the meantime, the course of events recited below was developing into the emergency situation FRA now addresses, persuading FRA to change its view of the necessity of immediate action.

At a meeting of the Operating Rules Working Group held in Chicago, Illinois, on September 25–26, 2008, a draft of FRA's proposed Emergency Order on the use of cell phones, and other forms of wireless communication, was discussed and much valuable input received.

Fatal Railroad Accidents During 2008 Involving Cell Phone Use That Are Currently Under Investigation by National Transportation Safety Board, FRA, or Both

(1) The National Transportation Safety Board (NTSB or Safety Board) and the FRA are currently investigating the September 12, 2008 head-on collision between a Southern California Regional Rail Authority (Metrolink) commuter train and a Union Pacific Railroad Company (UP) freight train at Chatsworth, California, which resulted in the deaths of 25 people, the injury of numerous others, and more than $7,100,500 in damages. Although NTSB has not yet determined the probable cause of the accident, preliminary information indicates that the locomotive engineer of the Metrolink commuter train may have passed a stop signal. NTSB stated that a cell phone owned by the locomotive engineer was being used to send a text message within 30 seconds of the time of the accident.

(2) On June 8, 2008, a UP brakeman was struck and killed by the train to which he was assigned. FRA's investigation, which has not yet been completed, indicates that the brakeman instructed the locomotive engineer via radio to back the train up and subsequently walked across the track, into the path of the moving train. Information indicates that the brakeman was talking on his cell phone at the time of the accident.

Train Collisions Between 2000 and 2006 in Which Cell Phone Use Was Involved

(1) *Marshall, Texas.* 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. Although there were no injuries, damages were estimated at $413,194. Both trains had two-person crews. The striking train had passed a "Stop and Proceed at Restricted Speed" signal and was moving at 20 mph. FRA determined (1) that the collision was caused by the failure of the locomotive engineer of the striking train to comply with restricted speed and (2) that the locomotive engineer of the striking train was engaged in cell phone conversations immediately prior to the accident.

(2) *San Antonio, Texas.* On May 27, 2006 an eastward UP freight train collided head on with a westward UP freight train at San Antonio, Texas. There were four injuries, and damages were estimated at $401,779. Both trains had two-person crews. FRA determined that the collision was caused by the eastward train locomotive engineer's inattentiveness because he was engaged in a cell phone conversation and by the conductor's failure to supervise safe operations.

(3) *Gunter, Texas.* On May 19, 2004, one locomotive engineer died, and a train conductor suffered serious burns when two BNSF freight trains collided head on near Gunter, Texas. The southbound train was traveling approximately 37 mph and the northbound train was traveling about 40 mph when the collision occurred. The trains were being operated under track warrant control rules on non-signaled single track territory. The collision resulted in the derailment of five locomotives and 28 cars, with damages estimated at $ 2,615,016. Approximately 3,000 gallons of diesel fuel were released from the locomotives, which resulted in a fire.

The General Code of Operating Rules and the BNSF System General Order Number 37 dated March 7, 2004, restricted the use of cell phones and other electronic devices. Cell phones were not to be used by crewmembers while the train or engine was moving. However, cell phone use was allowed while the train or engine was stopped, providing that such use did not interfere with required duties. Safety Board investigators obtained records that showed the number and duration of cell phone calls made by crewmembers on both trains between 1:50 p.m. and the time of the accident. During this time, a total of 25 cell phone calls were made or received by the five crewmembers on both trains while the trains were in motion. Three of these calls were related to railroad business. The southbound engineer made two of the business-related calls, and the northbound conductor made the third.

The southbound engineer's cell phone record showed activity between 3:12 p.m. and 3:16 p.m. This time period coincides with the time that track warrant authority was being received by the conductor on the southbound train. (Track Warrant No. 3583 was made effective at 3:17 p.m.) BNSF track warrant procedures required the receiver (the conductor on the southbound train in this case) to repeat back verbatim certain critical portions of the track warrant. In this instance, the track warrant had to be repeated back to the dispatcher several times before it was considered correct.

Following the 3:17 p.m. effective time on Track Warrant No. 3583, the dispatcher asked the engineer on the southbound train to use his cell phone to call him at the Network Operations Center. The engineer had to call the dispatcher twice because of poor transmission or reception during the first call. The first call to the dispatcher was made at 3:22 p.m., and the second call was made at 4:02 p.m. Both calls were recorded. The dispatcher asked the engineer to provide additional assistance to the conductor in future track warrant communications. Event recorder data indicate that both calls were made while the train was in motion. The conductor on the northbound train's cell phone records showed a call to the BNSF work order reporting line 27 at 5:04 p.m. Event recorder data indicate that the train was in motion at that time. The last cell phone activity for the southbound crew was recorded at 5:31 p.m. The call lasted about 2 minutes while the train was stopped. The last cell phone activity for the northbound crew before the collision was recorded at 5:24 p.m. The call lasted about 3 minutes while the train was moving. A 911 call was originated from the BNSF 6351 northbound brakeman's cell phone at 5:48 p.m; the accident took place at approximately 5:46 p.m.

(4) *Clarendon, Texas.* At 8:57 a.m. on May 28, 2002, an eastbound BNSF coal train collided head on with a westbound BNSF intermodal train near Clarendon, Texas. Both trains had two-member crews, and all crewmembers jumped from their trains before the impact. The conductor and engineer of the coal train received critical injuries. The conductor of the intermodal train received minor injuries; the engineer of the intermodal train was fatally injured. The collision resulted in a fire that damaged or destroyed several of the locomotives and other railroad equipment. The cost of the damages exceeded $8,000,000.

NTSB found that all four crewmembers involved in this accident

had personal cell phones. According to cell phone records obtained by the Safety Board, the conductor of the coal train used his cell phone for brief calls before the train departed Amarillo. The cell phone belonging to the engineer of the coal train was used for two calls during the morning of the accident. At 8:05 a.m., a 23-minute call originated from the engineer's cell phone. After the completion of this call, and after about 16 minutes of non-use, another call originated from the engineer's phone at 8:44 a.m. This time corresponds to the end of the last track warrant, which was given to the coal train at 8:43 a.m. This call, which lasted about 10 minutes, was to the same number as the previous call. The engineer said, and telephone company records confirm, that the number called was that of a family member. The engineer said that he could not recall the substance of the telephone calls that day. He added that he usually called this family member, who was in failing health, each morning. The coal train passed the east end of Ashtola Siding, the location at which it should have waited for the arrival of the intermodal train, at about 8:47 a.m. The engineer said he did not remember specifically being on the phone at the time his train passed the east end of Ashtola Siding.

In its investigation of the Clarendon accident, NTSB found that the use of a cell phone by the engineer of one of the trains may have distracted him to the extent that he was unaware of the dispatcher's instructions that he stop his train at a designated point. NTSB consequently issued recommendation R–03–1 to FRA: "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."

After the Clarendon accident and as a result of a two additional collisions, BNSF, on June 18, 2002, issued instructions to operating employees that specifically prohibited the use of cell phones and laptop computers while on duty, with certain exceptions. Under these instructions, locomotive engineers are prohibited from using cell phones or laptop computers while operating the controls of a locomotive.

Fatal Train Incidents Between 2000 and 2005 Linked With Cell Phone Usage

(1) *Copeville, Texas.* On December 21, 2005, a contractor working on The Kansas City Southern Railway Company's (KCS) property at Copeville, Texas was struck and killed when he stepped into the path of an approaching freight train. FRA's investigation disclosed that the contractor was talking on a cell phone at the time of the accident. (2) *Gillette, Wyoming.* On December 29, 2000, a BNSF freight train operating on the UP was stopped on a siding at Gillette, Wyoming to allow another train to pass. The conductor of the stopped train exited the leading locomotive and crossed over the track immediately in front of the passing train and was struck and killed. The FRA investigation revealed the strong possibility that the conductor may have been distracted by his cell phone use.

Unsafe Behavior Observed or Otherwise Witnessed by FRA Inspectors

During the course of regular inspection and enforcement activities, FRA railroad safety inspectors have observed railroad employees using cell phones in an unsafe manner, often in contravention of existing railroad rules and instructions. The inspectors took action to prevent an accident from occurring, but did so under FRA's general railroad safety authority, not pursuant to any Federal order, rule, standard or regulation.

The following are examples of the unsafe behavior that FRA inspectors observed and corrected:

- An FRA operating practices specialist observed a locomotive engineer at the controls of a moving passenger train answer a cell phone call from his conductor. The conductor asked the locomotive engineer to order a taxi cab for the crew and the locomotive engineer placed such a call.
- Two FRA operating practices inspectors observed a remote-control locomotive operator walking across the tracks with his head down and talking on a cell phone. The inspectors approached him, and he admitted that the call was not work-related.
- An FRA operating practices inspector observed a locomotive engineer receive a call on a cell phone while operating the train. The engineer answered the call and told the caller he would return his call later. When the inspector questioned the engineer about his actions, the engineer stated that he was a union representative and he needed to be available to his constituents.
- On at least two occasions, an FRA Regional Administrator received telephone calls from locomotive engineers with concerns about safety issues. During the course of the telephone calls, the Regional Administrator heard a train horn and asked the locomotive engineers if they were operating a train. When they replied in the affirmative, the Regional Administrator terminated the telephone calls. An FRA headquarters specialist recently reported having the same experience. On at least two other occasions, FRA field personnel observed remote-control locomotive operators talking on a cell phone while operating the remote control locomotive.
- An FRA Deputy Regional Administrator was conducting an initial pre-employment interview over the telephone with a locomotive engineer who was applying for an FRA operating practices inspector position. The deputy regional administrator heard a train horn in a two long, one short, and one long pattern and asked the candidate if he was operating a locomotive. The candidate replied that he was, and the deputy regional administrator terminated the telephone call. The candidate was not selected.
- An FRA chief inspector observed an engineer on a passenger train use his cell phone to take a call from his conductor who was trying to find out what channel the engineer was working on. The train was operating at 5 mph in yard limits.
- An FRA hazardous materials inspector observed a remote control locomotive operator talking on a cell phone while operating the controls of a remote control locomotive during switching operations.
- A hazardous materials inspector observed a locomotive engineer initiate a phone call to the dispatcher on his personal cell phone for the purpose of copying a track warrant while operating the controls of a locomotive. Additionally, the same engineer was observed initiating a cell phone call to the dispatcher, while at the controls of a moving locomotive, releasing a track warrant, during a shoving move with the conductor on the point of the equipment.
- 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.
- On at least two occasions, FRA personnel have observed railroad employees on locomotives watching digital video disc (DVD) players.
- Three days after the head-on collision in Chatsworth, an FRA operating practices observed a commuter rail engineer on another railroad answer a cell phone while awaiting a signal to depart the initial passenger station for his trip. The

locomotive engineer answered the phone after the FRA inspector had identified himself.

The incidents noted above occurred in various parts of the country, and involved both freight and passenger trains.

Scientific Research on Cell Phones as a Distraction[1]

Motor Vehicle Operation

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.

Use of cell phones (voice communication) while driving increases reaction times, causes failures to detect hazards, and to have more variability in lane position. A driver's use of cell phones up to 10 minutes before a crash, or at the time of a collision, was found to be associated with a fourfold increased likelihood of being involved in a crash (McCartt *et al.*, 2006; McEvoy, Stevenson, McCartt, Woodward, Haworth, Palamara, and Cercarelli 2005).

Text messaging has similar effects on driving performance. For instance, Hosking, Young, and Regan (2006) found that text messaging caused a 400-percent increase in time looking away from the road as compared to driving without text messaging. Reed and Robbins (2008) found increased reaction times, failures to detect hazards, and large increases in lane position variability. The increased reaction times observed were greater than that caused by alcohol consumption (to legal limit) and cannabis. They concluded that increased mental workload, loss of motor control caused by holding the phone, and constant shifting of visual gaze resulted in significantly impaired ability to maintain a safe road position while text messaging.

These research studies are bolstered by two highway accident investigations conducted by NTSB (NTSB, 2003b, 2007). In 2002, a Ford Explorer Sport landed on top of a Ford Windstar minivan that was subsequently hit by a Jeep Cherokee (see NTSB, 2003b). The accident resulted in five fatalities. NTSB determined that the probable cause of the collision was "the Explorer driver's failure to maintain directional control of her high-profile, short-wheel base vehicle in the windy conditions due to a combination of inexperience, unfamiliarity with the vehicle, speed, and *distraction caused by the use of handheld wireless telephone.*" (Emphasis added to original text. NTSB, 2003b, p. 62). In 2004, the driver of a motorcoach on the George Washington Memorial Parkway collided with the side and underside of an overpass while talking on a hands-free cell telephone (see NTSB, 2007). NTSB determined that the probable cause of this collision "was the bus driver's failure to notice and respond to posted low-clearance warning signs and to the bridge itself due to cognitive distraction resulting from conversing on a hands-free cellular telephone while driving." (NTSB, 2007, p. 33). It should be noted that the research studies cite increased variability in lane position, which corresponds to the failure to maintain directional control of the vehicle in the 2002 accident, and failures to detect hazards, which corresponds to the bus driver's lack of response to the low-clearance warnings.

Train Operations

While there are no research studies of locomotive engineer distraction and safety performance, we can easily draw parallels between operating a motor vehicle and operating a train. Failures to detect hazards in either operating environment would result from the increase in heads-down time, constant shift of visual gaze and increased mental workload. In the railroad environment, this could result in the failure to detect signals, whistle boards, rear end marking devices, broken rails and other conditions that could cause derailments or collisions. The increased mental workload and heads-down time could also degrade situation awareness and result in speeding, excessive braking, missed radio communications, and poor train handling.

A railroad accident report by NTSB (2003a) confirms the parallels noted above. As noted above, in 2002, two freight trains had a head-on collision near Clarendon, Texas. NTSB determined that the probable cause of this accident was "the coal train engineer's use of a cell phone during the time he should have been attending to the requirements of the track warrant his train was operating under." (NTSB, 2003a, p. 28). NTSB's findings noted that the cell phone use probably distracted the engineer and caused him not to take note of an after-arrival stipulation in the track warrant that required him to prepare his train to stop. Again, this is a failure to detect a hazard.

[1] References for this section: Brown, I.D., and Poulton, E.C. (1961). Measuring the spare mental capacity of car drivers by a subsidiary task. *Ergonomics, 4,* 35–40.

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Trezise, I., Stoney, *E.G.*, Bishop, B., Eren, J., Harkness, A., Langdon, C., and Mulder, T. (2006). *Report of the road safety committee on the inquiry into driver distraction* (Report No. 209). Melbourne, Australia: Road Safety Committee, Parliament of Victoria.

Findings and Order

Based on the evidence recited above, I find that railroad operating employees are increasingly using cell phones and other electronic and electrical devices during railroad operations, in violation of railroad operating rules, in a manner and to an extent that these practices constitute an emergency situation involving a hazard of death or personal injury because use of these devices distracts the users' attention from safety-critical duties. These obviously unsafe practices reflect the powerful influence of pervasive private use of cell phones and other electronic and electrical devices; powerful intervention, in the form of this Emergency Order, is necessary to counteract that influence and to eliminate this source of extremely dangerous distraction in the railroad operating environment. I find that the unsafe conditions previously discussed create an emergency situation involving a hazard of death or personal injury. Accordingly, pursuant to the authority of 49 U.S.C. 20104, delegated to me by the Secretary of Transportation (49 CFR 1.49), it is hereby ordered that, on and after October 27, 2008, the prohibitions and restrictions described below shall be observed by railroad operating employees and railroads.

(a) *Scope.* This order sets forth prohibitions and restrictions that apply to railroad operating employees' use of mobile telephones (commonly called cell telephones or cell phones), other electronic devices or electrical devices, and other portable electronic devices (such as portable digital video disc (DVD) players, radio receivers, and audio players) capable of distracting a railroad operating employee from a safety-critical duty (by railroad operating employees either while in the cab of a moving locomotive, while working on the ground in proximity to a live track) or while another employee of the railroad is assisting in preparation of the train (*e.g.*, during an air brake test). This order does not restrict use of the railroad radio nor does it affect the use of working wireless communications under 49 CFR Part 220.

(b) *Definitions.* In this order—

(1) *Fouling a track* means the placement of an individual in such proximity to a track that the individual could be struck by a moving train or other on-track equipment, or in any case is within four feet of the nearest rail.

(2) *Personal electronic or electrical device* means an electronic or electrical device that was not provided to the railroad operating employee by the employing railroad for one or more business purposes.

(3) *Railroad operating employee* means a person performing duties subject to 49 U.S.C. 21103, "Limitation on duty hours of train employees," an individual engaged in or connected with the movement of a train, including a hostler.

(4) *Railroad-supplied electronic or electrical device* means an electronic or electrical device provided to a railroad operating employee by the employing railroad for one or more business purposes.

(5) *Switching operation* means the classification of freight cars according to commodity or destination; assembling of cars for train movements, changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

(6) *Train* means (i) a single locomotive, (ii) multiple locomotives coupled together, or (iii) one or more locomotives coupled with one or more cars.

(7) *Use of an electronic or electrical device* means use of a mobile telephone or another electronic or electrical device to conduct an oral communication; place or receive a telephone call; send or read an electronic mail message or text message; play a game; navigate the Internet; play, view, or listen to a video; play, view, or listen to a television broadcast; play or listen to a radio broadcast other than a radio broadcast by a railroad; play or listen to music; to execute a computational function, or to perform any other function that is not necessary for the health or safety of the person and that entails the risk of distracting the employee from a safety-critical task. An electronic or electrical device that enhances the individual's physical ability to perform these tasks, such as a hearing aid, is not covered by this order.

(8) *Wireless communication device* means an electronic device capable of communicating remotely. Examples include cell phones, personal digital assistants (PDAs) and portable computers (commonly called laptop computers). References to use of a wireless communication device include oral conversations, text messaging, electronic mail, and transmission or receipt of a file and one or more media.

(c) *Personal electronic and electrical devices.* (1) Each personal electronic or electrical device must be turned off with any earpieces removed from the ear while on a moving train, except that, when radio failure occurs, a wireless communication device may be used in accordance with railroad rules and instructions.

(2) Each personal electronic or electrical device must be turned off with any earpieces removed from the ear when a duty requires any railroad operating employee to be on the ground or to ride rolling equipment during a switching operation and during any period when another employee of the railroad is assisting in preparation of the train (*e.g.*, during an air brake test).

(3) Use of a personal electronic or electrical device to perform any function other than voice communication while on duty is prohibited. In no instance may a personal electronic or electrical device interfere with the railroad operating employee's performance of safety-related duties.

(d) *Railroad-supplied electronic and electrical devices.* (1) The use of a railroad-supplied electronic or electrical device by a locomotive engineer (including a remote-control locomotive operator) is prohibited while on a moving train, or when a duty requires any member of the crew to be on the ground or to ride rolling equipment during a switching operation, or during any period when another employee of the railroad is assisting in preparation of the train (*e.g.*, during an air brake test).

(2) A railroad operating employee other than a locomotive engineer operating the controls of a moving train may use a railroad-supplied mobile telephone or remote computing device in the cab of a moving locomotive for an authorized business purpose, after a safety briefing, provided that all assigned personnel on the crew agree that it is safe to do so. Any other use is prohibited in the cab.

(3) A railroad operating employee may use a railroad-supplied electronic or electrical device for an approved business purpose while on duty within the body of a passenger train or railroad business car. Use of the device shall not excuse the individual using the device from the responsibility to call or acknowledge any signal, inspect any passing train, or perform any other safety-sensitive duty assigned under the railroad's operating rules and special instructions.

(4) For freight train crewmembers, a railroad operating employee may not use a railroad-supplied electronic or electrical device for an approved business purpose while on duty outside the cab unless the following conditions are met: (1) The employee is not fouling a track; (2) no switching operation is underway; (3) no other safety duties are presently required; and (4) all members

of the crew have been briefed that operations are suspended.

(e) *Operational testing.* (1) The railroad's program of operational tests and inspections under 49 CFR Part 217 shall be revised as necessary to include the requirements of this order and shall specifically include a minimum number of operational tests and inspections, subject to adjustment as appropriate.

(2) When conducting tests and inspections under 49 CFR Part 217, a railroad officer, manager or supervisor is prohibited from calling the personal electronic or electrical device or the railroad-supplied electronic or electrical device used by a locomotive engineer while the train to which the locomotive engineer is assigned is moving.

(3) When an operational test involves stopping a train, interrupting a switching operation, or interrupting an activity involving other employees of the railroad (*e.g.*, through use of a banner, signal, or radio communication), the limitations set forth in this order regarding use of electronic and electrical devices shall continue to be in effect even though the train movement, switching operation, or other activity is temporarily suspended.

(f) *Exceptions.* Notwithstanding any other provision of this order—

(1) A railroad operating employee may use the digital storage and display function of a personal or railroad-supplied 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;

(2) Railroad operating employees may use a personal or railroad-supplied wireless communication device as necessary to respond to an emergency situation involving the operation of the railroad or encountered while performing a duty for the railroad;

(3) A locomotive engineer (including a remote-control locomotive operator) may use electronic control systems and informational displays presented to the locomotive engineer within the locomotive cab or on a remote control transmitter to operate a train or conduct a switching operation, including functions associated with controlling switches;

(4) Under conditions authorized under 49 CFR Part 220, a railroad operating employee may use a railroad-supplied or railroad-authorized working wireless communication device, in lieu of the railroad radio, to conduct train or switching operations;

(5) A railroad employee may refer to a digital timepiece to ascertain the time of day or to verify the accuracy of speed indicators.

(g) *Training.* Each railroad shall instruct each of its railroad operating employees and supervisors of railroad operating employees concerning the requirements of this order and implementing railroad rules and instructions. Such instruction shall be sufficient to ensure that the requirements of this order are understood, including any relevant distinctions between the minimum requirements of this rule and any more stringent requirements implemented by the railroad.

(h) *Sanctions.* (1) Any individual who willfully violates a prohibition stated in this order or uses any of the described devices without observing any of the restrictions stated in this order is subject to civil penalties under 49 U.S.C. 21301.

(2) In addition, such an individual whose violation of this order demonstrates the individual's unfitness for safety-sensitive service may be removed from safety-sensitive service on the railroad under 49 U.S.C. 20111.

(3) A railroad that violates this order may be subject to civil penalties under 49 U.S.C. 21301.

(4) FRA may, through the Attorney General, also seek injunctive relief to enforce this order. 49 U.S.C. 20112.

Relief

A railroad may obtain relief from this order by adopting other means of ensuring that railroad operating employees are not distracted from their duties by use of electronic or electrical devices or by implementing technology that will prevent inappropriate acts and omissions from resulting in injury to persons. Such relief may be obtained by petition to the FRA Associate Administrator for Safety establishing that the alternative means provide equivalent safety.

FRA anticipates that it will utilize the existing Railroad Safety Committee Operating Practices Working Group in the formulation of an amendment to 49 CFR Part 220 to address comprehensively the safety implications of the use of electronic devices by railroad employees. Until that is accomplished, this emergency order is necessary to reduce the likelihood of additional accidents caused by the unsafe use of electronic devices.

Effective Date and Notice To Affected Persons

On and after October 27, 2008, the prohibitions and restrictions described above shall be observed by railroads and railroad operating employees. Notice of this Emergency Order will be provided by publishing it in the **Federal Register.**

Review

Opportunity for formal review of this emergency order will be provided in accordance with 49 U.S.C. 20104(b) and section 554 of title 5 of the United States Code. Administrative procedures governing such review are found at 49 CFR part 211. *See* 49 CFR 211.47, 211.71, 211.73, 211.75, and 211.77.

Issued in Washington, DC, on October 1, 2008.

Joseph H. Boardman,

Administrator.

[FR Doc. E8–23755 Filed 10–6–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

[Docket: RITA 2008–0002 BTS Paperwork Reduction Notice]

Agency Information Collection; Bureau of Transportation Statistics; Activity Under OMB Review; Submission of Audit Reports—Part 248

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, the Bureau of Transportation Statistics invites the general public, industry and other governmental parties to comment on the continuing need for and usefulness of BTS requiring U.S. large certificated air carriers to submit two true and complete copies of its annual audit that is made by an independent public accountant. If a carrier does not have an annual audit, the carrier must file a statement that no audit has been performed. Comments are requested concerning whether (1) The audit reports are needed by BTS and DOT; (2) BTS accurately estimated the reporting burden; (3) there are other ways to enhance the quality, utility and clarity of the information collected; and (4) there are ways to minimize reporting burden, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted by December 8, 2008.

ADDRESSES: You may submit comments identified by DOT Docket ID Number RITA 2008–0002 by any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.