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VICTOR A. RUSSO

Dear Brothers and Sisters,

We would like to share some information with you regarding air conditioning units in locomotive cabs, seals on cab windows and doors, and diesel exhaust/fumes inside the cabs. The Federal Railroad Administration (“FRA”) has regulated safety standards on these matters and, working together, the regulations should provide occupants/train crews comfortable temperatures and healthy air quality inside the cab. Unfortunately, railroad employers sometimes fail to comply with safety standards and attempt to dilute the effectiveness of the regulations.

Attached are pertinent safety regulations which impose on railroads safety requirements inside the locomotive cab regarding the abovementioned matters. We also included an FRA commentary pertinent to the issue of exhaust in the cab. We hope the information will assist you in asserting your rights for a safer work environment inside a locomotive cab after you review the materials.

49 C.F.R. § 229.119, “Cabs, floors, and passageways.”

(g) Each locomotive or remanufactured locomotive placed in service for the first time on or after June 8, 2012, shall be equipped with an air conditioning unit in the locomotive cab compartment.

(h) Each air conditioning unit in the locomotive cab on a locomotive identified in paragraph (g) of this section shall be inspected and maintained to ensure that it operates properly and meets or exceeds the manufacturer’s minimum operating specifications during the periodic inspection required for the locomotive pursuant to § 229.23 of this part.

[These subsections pertain to requirements for air conditioning units in locomotives that were placed in service on or after June 8, 2012. For all locomotives before that date, if the railroad installed an air conditioning unit in the cab before it was required by the FRA, the railroad is responsible for ensuring that the unit operates properly. The railroad can be held liable if an injury results from a poorly maintained air conditioning unit. See law explained below.]

49 C.F.R. § 229.121, “Locomotive cab noise.”

“Conditions that may lead a locomotive cab occupant to file an excessive noise report include, but are not limited to: defective cab window seals; defective cab door seals...”

[If a proper window or door seal can keep out noise, it should also be able to keep out exhaust and fumes. Under the FELA, when a railroad’s violation of a safety regulation causes injury, the railroad will be held liable regardless of whether the injury was of the type that the regulation sought to prevent.]

49 C.F.R. § 229.43 “Exhaust and battery gases.”

“Products of combustion shall be released entirely outside the cab and other compartments.”

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See “Diesel Exhaust in Locomotive Cabs” at p. 21323.

FRA: “Diesel exhaust from the locomotive engine that is released into an occupied locomotive cab causes a safety risk.”

[We believe 49 CFR 229.43 is clear and unequivocal about keeping exhaust outside the cab. The FRA, however, commented that not all exhaust can be prevented from entering the cab, such as when a locomotive is standing with its windows open and its engine not running next to a highway or in a marine port. Note that this scenario is very different from an exposure to high levels of diesel exhaust that enter the cab and result in injury. Such traumatic exposures expose railroads to liability.]

A railroad employer may violate the Locomotive Inspection Act (“LIA”) in two ways: (1) by breaching the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary danger of personal injury at all times; or, (2) by failing to comply with the FRA’s locomotive safety regulations under 49 C.F.R. Part 229. An LIA violation cannot be excused, nor its noncompliance be justified, since FELA liability is absolute upon proof of an unsafe part and proximate cause. Additionally, once a railroad chooses to install a piece of equipment that is not required by the FRA, like an icebox, then the railroad must properly maintain that piece of equipment. If it fails to do so, and injury results, the railroad can be held liable for violating the LIA. Attached is our partial summary judgment motion in *Eutsler v. Union Pacific Railroad Company*, which sets forth the abovementioned points.

We hope this helps. In closing, Brothers and Sisters, please remember to use Hildebrand, McLeod & Nelson, LLP as a resource to further educate yourself and your members. If you would like this package attached to an email in PDF format let us know and we will send it to you to better enable you to share it with your members. You are encouraged to share these documents with your members as an educated union is the best way to protect and expand your rights.

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49 C.F.R. § 229.119

§ 229.119 Cabs, floors, and passageways.

(a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

(b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, [Safety Glazing Standards, 49 CFR part 223, 44 FR 77348](#), Dec. 31, 1979.)

(c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

(d) Any occupied locomotive cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 60 degrees Fahrenheit 6 inches above the center of each seat in the cab compartment.

(e) Similar locomotives with open-end platforms coupled in multiple control and used in road service shall have a means of safe passage between them; no passageway is required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.

(f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

(g) Each locomotive or remanufactured locomotive placed in service for the first time on or after June 8, 2012, shall be equipped with an air conditioning unit in the locomotive cab compartment.

(h) **Each air conditioning unit in the locomotive cab** on a locomotive identified in paragraph (g) of this section shall be inspected and maintained to ensure that it operates properly and meets or exceeds the manufacturer's minimum operating specifications during the periodic inspection required for the locomotive pursuant to [§ 229.23](#) of this part.

(i) Each locomotive or remanufactured locomotive ordered on or after June 8, 2012, or placed in service for the first time on or after December 10, 2012, shall be equipped with a securement device on each exterior locomotive cab door that is capable of securing the door from inside of the cab.

49 C.F.R. § 229.119

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§ 229.121 Locomotive cab noise.

(a) Performance Standards for Locomotives.

- (1) When tested for static noise in accordance with paragraph (a)(3) of this section, all locomotives of each design or model that are manufactured after October 29, 2007, shall average less than or equal to 85 dB(A), with an upper 99% confidence limit of 87 dB(A). The railroad may rely on certification from the equipment manufacturer for a production run that this standard is met. The manufacturer may determine the average by testing a representative sample of locomotives or an initial series of locomotives, provided that there are suitable manufacturing quality controls and verification procedures in place to ensure product consistency.
- (2) In the maintenance of locomotives that are manufactured in accordance with paragraph (a)(1) of this section, a railroad shall not make any alterations that cause the average sound level for that locomotive design or model to exceed:
 - (i) 82 dB(A) if the average sound level for a locomotive design or model is less than 82 dB(A); or
 - (ii) 85 dB(A) if the average sound level for a locomotive design or model is 82 dB(A) to 85 dB(A), inclusive,
- (3) The railroad or manufacturer shall follow the static test protocols set forth in appendix H of this part to determine compliance with paragraph (a)(1) of this section; and, to the extent reasonably necessary to evaluate the effect of alterations during maintenance, to determine compliance with paragraph (a)(2) of this section.

(b) Maintenance of Locomotives.

- (1) If a railroad receives an excessive noise report, and if the condition giving rise to the noise is not required to be immediately corrected under part 229, the railroad shall maintain a record of the report, and repair or replace the item identified as substantially contributing to the noise:
 - (i) on or before the next periodic inspection required by § 229.23; or
 - (ii) if the railroad determines that the repair or replacement of the item requires significant shop or material resources that are not readily available, at the time of the next major equipment repair commonly used for the particular type of maintenance needed.
- (2) **Conditions that may lead a locomotive cab occupant to file an excessive noise report include, but are not limited to: defective cab window seals; defective cab door seals; broken or inoperative windows;** deteriorated insulation or insulation that has been removed for other reasons; broken or inoperative doors; and air brakes that vent inside of the cab.

(3) A railroad has an obligation to respond to an excessive noise report that a locomotive cab occupant files. The railroad meets its obligation to respond to an excessive noise report, as set forth in paragraph (b)(1) of this section, if the railroad makes a good faith effort to identify the cause of the reported noise, and where the railroad is successful in determining the cause, if the railroad repairs or replaces the items cause the noise.

(4) Recordkeeping.

- (i)** A railroad shall maintain a written or electronic record of any excessive noise report, inspection, test, maintenance, replacement, or repair completed pursuant to § 229.121(b) and the date on which that inspection, test, maintenance, replacement, or repair occurred. If a railroad elects to maintain an electronic record, the railroad must satisfy the conditions listed in § 227.121(a)(2)(i) through (v).
- (ii)** The railroad shall retain these records for 92 days if they are made pursuant to § 229.21, or for one year if they are made pursuant to § 229.23.
- (iii)** The railroad shall establish an internal, auditable, monitorable system that contains these records.

49 C.F.R. § 229.43

§ 229.43 Exhaust and battery gases.

(a) Products of combustion shall be released **entirely outside** the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments **under usual operating conditions**.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

stakeholders. By overcoming institutional and financial barriers to technology harmonization, stakeholders could realize lower life-cycle costs for the acquisition and maintenance of systems. FRA will pursue appropriate, cost effective, performance based standards containing precise criteria to be used consistently as rules, guidelines, or definitions of characteristics, to ensure that materials, products, processes and services are fit for purpose, and present an acceptable level of risk that are applicable across all elements of the railroad industry. FRA believes that establishing a safety analysis requirement in this final rule that is based on best engineering practices and standards in section 237.307 is consistent with goal of standardization and harmonization.

M. Locomotive Cab Securement

On June 20, 2010, a CSX Conductor was shot and killed in the cab of the controlling locomotive of his standing train in New Orleans, during an attempted robbery. The Locomotive Engineer assigned to that train was also wounded by gunfire during the incident. This incident was particularly tragic, because it resulted in a fatality. By letter dated September 22, 2010, in response to this incident, the BLET requested that FRA require door locks on locomotive cab doors. Under current industry practice, many locomotive cab doors are not locked. According to BLET's letter, requiring the use of door locks would impede unauthorized access to the locomotive cab and reduce the risk of violence to the train crew when confronted by a potential intruder.

In the NPRM, FRA requested comments on the various securement options that are currently available on locomotive cab doors, and whether equipping the locomotive cab with a securement device would improve safety. Based on its review of comments received, FRA believes that locomotive cab securement can potentially prevent unauthorized access to the locomotive cab, and thereby increase train crew safety.

The BLET and UTU submitted comments stating that locks should be designed to open from within the locomotive cab without the use of a key. Locomotive cab securement demands a careful and balanced approach, because when emergencies requiring emergency egress or rescue access occur, securement systems must not hinder rapid and easy egress by train crews or access by emergency responders without undue delay. A latching device (e.g., a dead-bolt arrangement) is

sufficient to satisfy this requirement. This final rule requires that each locomotive or remanufactured locomotives ordered on or after the effective date of the final rule, or placed in service for the first time on or after six months from the effective date of the rule, be equipped with a securement device. However, FRA believes that the decision whether to use the securement device is best left to the discretion of each railroad.

AAR submitted comments stating that the railroad industry is currently developing a securement standard that will address safety concerns. Based on information gathered while attending industry meetings, FRA understands that the railroad industry is working on producing a standard that will require a securement device on the outside of an unattended locomotive cab. FRA believes that the industry is moving in the right direction on this issue and will continue to monitor the development of a new standard. If FRA determines that the actions currently being undertaken by the industry are not sufficient to ensure the proper securement of locomotive cabs from the outside, FRA will consider taking regulatory action to address this issue in a future rulemaking.

A Battalion Fire Chief from Fairfax County, Virginia, submitted comments stating that a rapid-entry box system (similar to a realtor's lock-box system) would ensure access by emergency responders into a locked locomotive cab. FRA believes that a rapid-entry box system could improve emergency responder access into the locomotive cab. However, at this time, FRA believes it would be impractical to require such a system, due to the potential cost of equipping all locomotives with the locks, the significant logistic challenges involved with distributing keys to emergency responders throughout the country, and the inability of FRA to ensure that those keys are secure.

N. Diesel Exhaust in Locomotive Cabs

In response to the NPRM, AAR submitted comments requesting that FRA clarify the meaning of existing § 229.43. Section 229.43 requires that locomotives be built with exhaust systems that are properly designed to convey engine exhaust from the engine and release it outside of the locomotive, and to ensure that the exhaust system is maintained to prevent leaks of exhaust into an occupied locomotive cab. FRA has been consistent in its enforcement of this requirement. FRA has not discovered locomotive exhaust systems that have noncompliant designs. However, FRA has found mechanical

defects (e.g., a cracked exhaust manifold) in locomotive exhaust systems that permit exhaust to be released into an occupied locomotive cab, and has routinely issued violations for the railroads' failure to comply with § 229.43.

Diesel exhaust from the locomotive engine that is released into an occupied locomotive cab causes a safety risk. The exhaust can adversely affect the train crew and their ability to operate the locomotive safely. Inside the locomotive cab, the exhaust causes an inhalation hazard and will reduce the train crew's vision and comfort. However, FRA did not intend for § 229.43 to prevent any and all diesel exhaust from being present in an occupied locomotive cab. It would be impracticable to try to eliminate all diesel exhaust in the locomotive cab. A locomotive that is standing with its windows open and its engine not running next to an active highway will most likely be found to have some measurable quantity of diesel exhaust in the cab, due to the traffic from the highway. The same would be found if the locomotive were located in a similar circumstance in an active marine port. Similarly, FRA does not believe that it is possible to prevent the re-entry of diesel exhaust into the locomotive cab through windows or ventilation system intakes, and has never enforced the existing regulation in such a manner.

O. Federalism Implications

One commenter suggested that FRA should add language to its discussion of the federalism implications of this final rule to clarify the pre-emptive effect of the rule. The discussion of federalism contained in the NPRM explains the federalism implications of the Locomotive Inspection Act and the existing Locomotive Safety Standards. See 76 FR 2224. FRA believes that the discussion of federalism implications is clear, and that changes to the final rule regarding the pre-emptive effect of the rule are not necessary.

P. E.O. 13563 Retrospective Review

In accordance with the requirements of E.O. 13563, this final rule modifies the existing locomotive safety standards based on what has been learned from FRA's retrospective review of the regulation. E.O. 13563 requires agencies to review existing regulations to identify rules that are overly burdensome, and when possible, modify them to reduce the burden. As a result of its retrospective review, FRA is reducing the burden on the industry by modifying the regulations related to periodic locomotive inspection and