

TAVORMINA & YOUNG, L.L.P.  
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The new FRA regulations on Electronic Devices go into effect on March 26, 2011. The following article contains the entire regulation as well as explanatory questions and answers I prepared that will clarify some confusing issues. Print this and keep it handy for ready reference.

## USE OF ELECTRONIC DEVICES ON THE RAILROAD

It is well documented that several recent tragic railroad accidents were caused in part by the usage of a cell phone. The first reported case took place on May 28, 2002 when an engineer used his cell phone just prior to the accident, which distracted the engineer and resulted in a head on collision.<sup>i</sup> As cell phone use and texting increased other accidents occurred, including the tragic collision of September 12, 2008 between a Metrolink passenger train and a Union Pacific freight train in Chatsworth, California where 25 people were killed.<sup>ii</sup> Immediately after this collision the Federal Railroad Administration promulgated Emergency Order 26, which basically prohibited the use of a cell phone and any electronic device by a trainman or engineer while at work.<sup>iii</sup>

On May 18, 2010 the Federal Railroad Administration (FRA) published a notice of Proposed Rule Making in which FRA sought input on various aspects of the use of electronic devices and cell phones by those engaged in a safety sensitive position at the railroad. After receiving input from the various labor organizations including the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union, FRA published its final rule on September 27, 2010 which will become effective March 26, 2011.<sup>iv</sup>

The new regulation establishes minimum standards and in some situations the railroads will be allowed to impose more stringent standards by rule. The new regulation basically prohibits the use of a cell phone while engaged in any safety sensitive duty. It does provide for the use of cell phone while deadheading, so long as the person is not in the controlling cab of a locomotive and it does not interfere with the employee's safety related functions.<sup>v</sup> Also for the first time there is now a regulation that deals with taking pictures and video of safety issues at the workplace. Employees may now take pictures and video to document a safety hazard or a violation of a rail safety law, regulation, order, or standard.<sup>vi</sup> However, photographs or video may not be taken with a cell phone, but rather a stand-alone camera. Below is the regulation with explanatory questions and answers to help any member who has to live with and abide by the new regulation.

### DEFINITIONS

**Earpiece** means a small speaker that is inserted in or held next to the ear for use in transmitting related to an electronic device.

**Electronic Device** means an electronic or electrical device used to conduct oral, written, or visual communication; place or receive a telephone call; send or read an electronic mail message or text message; look at pictures; read a book or other written material; play a game; navigate the Internet; navigate the physical world; 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; execute a computational function; or, 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 or another

railroad operating employee from a safety-related task. The term does not include-

- (1) Electronic control systems and information displays with locomotive cab or on a remote control transmitter necessary for a locomotive engineer to operate a train or conduct switching, operations; or
- (2) A digital watch whose only purpose is as a timepiece.

**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.

**In deadhead status** means awaiting or in deadhead transport from one point to another as a result of a railroad-issued verbal or written directive.

**Medical device** means an instrument, apparatus, implement, machine, contrivance, implant, or other similar or related article (including a component part), or accessory that is intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease or other conditions.

**Personal electronic device** means an electronic device that was not provided to the railroad operating employee by the employing railroad for a business purpose.

- Railroad operating employee** means a person performing duties subject to-
- (1) 49 U.S.C. 21103. "Limitations on duty hours of train employees" (i.e. an individual engaged in or connected with the movement of a train, including a hostler);
  - (2) 49 U.S.C. 21103 as it was in effect on October 15, 2008 the day before the enactment of the Rail Safety Improvement Act of 2008, Public Law 110-432, Div. A 122 Stat. 4848. October 16, 2008 (i.e. train employees providing commuter rail passenger transportation or intercity rail passenger transportation as defined in 49 U.S.C. 24102); or
  - (3) Any Federal Railroad Administration regulations prescribed pursuant to 49 U.S.C. 21109 governing hours of service related to train employees.

**Railroad supplied electronic device** means an electronic device provided to a railroad operating employee by the employing railroad for an authorized business purpose.

**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 purposed 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.

**Train** for purposes of Subparts A and B, means one or more locomotives coupled with or without cars, requiring an air brake test in accordance with 49 CFR Part 232 or Part 238, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains. The term, for purposes of Subpart C, means:

- (1) A single locomotive,
- (2) Multiple locomotives coupled together, or

(3) One or more locomotives coupled with one or more cars.

### **1. Q. What part of the new regulation does Subpart C apply to?**

A. Subpart C applies to the new regulation, meaning the definition of a train with respect to the use of an electronic device means, a single or multiple locomotives coupled together with or without cars. This definition is much broader and includes yard jobs, road switchers, local and road freight assignments and anything else that has an engine and cars.

Subparts A and B of the regulation generally deal with railroad radio usage. These provisions were promulgated with the inception of railroad radios.

## **Subpart C-Electronic devices**

### **§ 220.301 Purpose and scope**

(a) The purpose of this subpart is to reduce safety risks resulting from railroad operating employees being distracted by the inappropriate use of electronic devices, such as mobile telephones (cell phones or cellular phones) and laptop computers.

(b) The applicability of this subpart is governed by § 220.3; this subpart, however does not affect the use of working wireless communications pursuant to Subparts A and B.

(c) The restriction of this Subpart C do not apply-

a. To the working radio; or

b. When a working radio failure occurs and an electronic device is used in accordance with railroad rules.

### **2. Q. Does section 220.301 apply to the engine radio or my walkie-talkie?**

A. No. This section applies to the use of cell phones and other electronic devices, but not to a working radio on a locomotive or a railroad issued walkie-talkie. None of the restrictions of Subpart C of this regulation apply to working railroad issued radios.

### **§ 220.303 General Use of Electronic Devices**

A railroad operating employee shall not use an electronic device if that use would interfere with the employee's or another employee's performance of safety related duties.

### **3. Q. What does this provision mean?**

A. There are really three definitions of electronic devices in the regulation: (a) electronic devices; (b) personal electronic devices; and (c) railroad supplied electronic devices. This section is a catch all provision which means that an operating employee must not use any type of electronic device if it would interfere with that employee's or another employee's performance of a safety related duty.

### **§ 220.305 Use of Personal Electronic Devices**

A railroad operating employee must have each personal electronic device turned off with any earpiece removed from the ear-

(a) When on a moving train;

(b) When any member of the crew is-

a. On the ground; or

- b. Riding rolling equipment during a switching operation; or
- (c) When any railroad employee is assisting in the preparation of the train for movement.

#### **4. Q. What does § 220.305 really mean?**

A. This means that the use of a personal electronic device is prohibited any time the train is moving or there is a safety related duty is being performed. This section is meant to be more restrictive than the next section which deals with railroad supplied electronic devices.

#### **§ 220.307 Use of Railroad Supplied Electronic Devices**

(a) *General Restriction.* A railroad operating employee may use a railroad supplied electronic device only for an authorized business purpose as specified by the railroad in writing.

(b) *Use by locomotive engineers operating controls.* A locomotive engineer operating the controls of a train shall not use a railroad supplied electronic device-

1. When on a moving train;
2. When any member of the crew is –
  - i. On the ground, or
  - ii. Riding rolling equipment during a switching operation; or
3. When any railroad employee is assisting in the preparation of the train for movement.

(c) *Use in freight and passenger locomotive cabs generally.* In addition to the restrictions on locomotive engineers described in paragraph (b) of this section, a railroad operating employee who is not in deadhead status shall not use a railroad-supplied electronic device in the cab of a controlling locomotive except for a mobile telephone or remote computing device which the employee may use only if, before use-

1. A safety briefing that includes all crewmembers is held; and
2. All crewmembers agree that it is safe to use the railroad supplied mobile telephone or remote computing device.

(d) *Use Outside Freight Locomotive Cabs.* A freight train crewmember who is not in deadhead status may use a railroad-supplied electronic device outside the cab of a controlling freight locomotive only if all of the following conditions are met:

1. The crewmember is not fouling a track;
2. Operations are suspended; and
3. All members of the crew have been briefed that operations are suspended.

#### **5. Q. Does this section apply to railroad supplied radios?**

A. No. This section neither prohibits nor deals with working railroad supplied radios. This section prohibits the engineer from using a railroad supplied electronic device while performing the listed activities. It also prohibits other crew members from using railroad supplied electronic devices while in the cab of the controlling locomotive, except for mobile phones and remote computing devices, unless a safety briefing is held and all crewmembers agree it is safe. The idea is to limit distractions for the engineer, including using some railroad supplied electronic device in order to prevent accidents.

Thus, this section really limits the use of railroad supplied electronic devices while in the cab of a controlling locomotive (whether moving or stopped) to two devices, mobile phones and remote computing devices (laptops, hammerheads) that are supplied by the railroad. Further, these devices can only be used for an authorized purpose, such as calling a dispatcher or yardmaster and/or arranging transportation for a deadhead, etc. Presumably this would allow a conductor to use a railroad supplied mobile phone to arrange for deadhead transportation while the train is moving. Use of railroad supplied electronic devices for personal use is prohibited. Finally, the provisions of this section do not apply to those in deadhead service. Section 220.311 deals with this issue.

## § 220.309 Permitted Uses

Notwithstanding any other limitations in the is subpart, a railroad operating employee may use the following, if that use does not interfere with any employee's performance of safety related duties-

(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 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 less than 400,000 annual employee work hours.

### 6. Q. Are these the only exceptions to the general prohibition of electronic devices?

A. Yes. The regulation basically provides six exceptions to the prohibition of electronic devices.

The use of an electronic storage device to retrieve operating documents is permitted by the regulation, but use of the device must first be authorized by a railroad operating rule, but its use is permissible. Note for example, that BNSF prohibits the use of this kind of a device to look up a rule, so long as the train is moving. Further, this exception does not apply to a locomotive engineer who is at the controls of a moving train or any other situation as set forth in § 220.307(b).

The use of a personal electronic device is permitted to respond to an emergency situation. This refers to situations where there is a radio failure, but it includes broader situations, such as a derailment. It does not refer to nor does it involve some type of personal emergency, such as a sick child at home.

A stand-alone camera, including a video camera may be used to take pictures or video of a safety hazard or a violation of a rail safety regulation, order or standard. This is a new provision that has never been a part of any Federal Regulation or agreement. Thus, it is now permissible for any operating employee to take pictures or video of any safety hazard or violation of a rail safety regulation, order or standard. However, it must be done in accordance with the stringent provisions set forth above.

A stand-alone calculator can be used for safety related purposes, such as computing train tonnage, train length and stopping distances and thus the regulation provides for its use. However, this does not include a cell phone calculator. Also this does mean that an engineer can use a calculator on a moving train or in any of the situations described in § 220.307(b).

The regulation also permits the use of a medical device consistent with the railroad standards for fitness for duty. This includes blood sugar monitors for those with a diabetic condition or for those using hearing aids.

Paragraph (f) exempts smaller railroads from being required to have a working radio on the controlling locomotive of certain trains so long as such usage is limited to performing the employees' railroad duties.

## § 220.311 **Railroad employees in deadhead status.**

(a) Notwithstanding other restrictions in this subpart, a railroad operating employee who is in deadhead status and not inside the cab of a controlling locomotive may use an electronic device only if the employee is not using the device in such a way that interferes with any employee's personal safety or performance of safety-related duties.

(b) A railroad employee who is in deadhead status and located inside the cab of a controlling locomotive must have each electronic device turned off with any earpiece removed from the ear-

1. When on a moving train;
2. When any member of the crew is-
  - i. On the ground, or
  - ii. Riding rolling equipment during a switching operation; or
3. When any railroad employee is assisting in preparation of the train for movement.

### **7. Q. Can I use my personal cell phone while waiting on a deadhead?**

A. Yes. The definition of a deadhead is "awaiting or in deadhead transport from one point to another as a result of a railroad-issued verbal or written directive." Thus, one who is waiting to deadhead could use his/her personal cell phone, so long as they are not in the cab of a controlling locomotive. Clearly one can use their personal cell phone while riding in a van, so long as the use does not interfere with another employee's personal safety or a safety related duty.

## § 220.313 **Instruction.**

(a) Program. Each railroad shall maintain a written program of instruction, training, and examination of each railroad operating employee and each supervisor of the railroad operating employee on the meaning application of the railroad's operating rules implementing the requirements of this subpart if these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction, train or examination required by this subpart with the program of instruction required under § 217.11 of this chapter.

1. The written program of instruction, training, and examination shall address the requirements of this subpart, as well as consequences of noncompliance.
2. The written program of instruction, training and examination shall include, but is not limited to, an explanation of the following;

- i. When a railroad operating employee must have personal electronic devices turned off with the earpiece removed for the ear as required by this subpart.
- ii. If a railroad supplies an electronic device to its railroad operating employee, when a railroad operating employee may use such a device. The employee must be trained on what constitutes an authorized business purpose.
- iii. The potential penalties and other consequences of committing a violation of this subpart, both those imposed by FRA and those imposed by the railroad, as well as any distinction between the requirements of this subpart and any more stringent requirements imposed by the railroad and the related distinction between the two set of potential consequences.

(b) *Implementation Schedule*: Each employee performing duties subject to the requirements in this subpart shall be initially trained.

1. No employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless the employee has been trained on these rules within the previous three years.
2. The records of successful completion of instruction, examination, and training require by this section shall document the instruction of each employee under this subpart.

(c) *Records*. Written records documenting successful completion of instruction, training, and

examination of each employee and of his or her supervisors shall be made and shall be retained at the railroad's system headquarters and at the division headquarters for each division where the employee is assigned for three calendar years after the end of calendar year to which they relate and made available to representatives of FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain a program, or any records maintained to prove compliance with such a program, by electronic recordkeeping in accordance with §§ 217.9(g) and 217.11 (c) of this section.

(d) *Approval process.* Upon review of the program of instruction, training and examination required by this section, the Associate Administrator for Railroad Safety/Chief Safety Officer may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval.

1. If the Associate Administrator for the Railroad Safety/Chief Safety officer disapproves the program, the railroad has 35 days from the date of the written notification of such disapproval to-

i. Amend its program and submit it to the Associate Administrator for Railroad Safety/Chief Safety Officer for approval; or  
ii. Provide a written response in support of the program to the Associate Administrator for Railroad Safety/Chief Safety Officer, who informs the railroad of FRA's final decision in writing.

2. A failure to submit the program with the necessary revisions to the Associate Administrator for Railroad Safety/Chief Safety Officer in accordance with this paragraph is considered a failure to implement a program under this subpart.

### **§ 220.315 Operational tests and inspections; further restriction on use of electronic devices.**

(a) The railroad's program of operational tests and inspections under Part 217 of this chapter shall be revised as necessary to include this subpart and shall specifically include a minimum number of operational tests and inspections, subject to adjustment as appropriate.

(b) When conducting a test or inspection under Part 217 of this chapter, a railroad officer, manager, or supervisor is prohibited from calling the personal electronic device or the railroad supplied electronic device used by a locomotive engineer while the train to which the engineer is assigned is moving.

(c) When an operational test involves stopping a train, interrupting a switching operation, or interrupting an activity involving another employee involved with the movement of the train (e.g. through the use of a banner, signal, or radio communication), the limitations on the use of electronic devices set forth in this subpart continue to be in effect although the train movement, switching operation, or other activity is temporarily suspended.

#### **8. Q. Does section 220.315 prohibit a manager from sending a text message to an engineer while he is running a train?**

A. Yes. The regulation prohibits a manager from calling or texting an engineer the train to which the engineer is assigned is moving. This would not prohibit a manager from calling or texting an engineer who is stopped. It would also not prohibit a manager from calling or texting a conductor on a moving train.

#### **9. Q. Can the FRA subpoena my cell phone records?**

A. Yes. The FRA has authority to subpoena cell phone records of any employee subject to this regulation. This means the FRA can obtain one's cell phone records without the person's permission. Of course if the FRA finds a violation, the records can be given to the railroad for disciplinary action.

**10. Q. What are the penalties for improper use of an electronic device?**

A. The FRA can fine an employee up to \$25,000.00 for a willful violation. A willful violation generally means the person is aware of law and blatantly disregards the law. The FRA could remove the person from service as the FRA has the authority to remove any employee from a safety sensitive position for a violation of a Federal regulation. Of course the railroad can discipline an employee for improper use of an electronic device as well.

**11. Q. Can a railroad manager force me to produce/inspect my cell phone?**

A. No. The regulation does not require that the employee submit his/her cell phone to a manager for inspection. This raises many invasion of privacy issues such as those provided under the Electronic Communications Privacy Act, 18 U.S.C. § 2510, et. seq. and/or the Stored Communications Act 18 U.S.C. § 2701, et. seq. However, in many ways this is a moot point as the records of cell phone use are certainly attainable through the subpoena powers of FRA.

Note also that most railroad operating rules require that a cell phone be turned off **and stored out of sight**. Therefore if a cell phone was turned off, but lying on the conductor's desk during normal operations, the railroad GCOR rule would be violated, even though the Federal regulation was not.

**12. Q. I am the engineer on a train. My train is stopped and the conductor is lining a switch for our movement; can I make a call on my cell phone?**

A. No. Cell phones and other personal electronic devices must not be turned on while any member of the crew including the engineer is on the ground performing safety related duties.

**13. Q. May I have my cell phone or other approved personal electronic device powered on while my train is stopped during an air brake test?**

A. No. Cell phones and other personal electronic devices must not be powered on while any employee is assisting in preparation of your train or engine for movement.

**14. Q. May a manager, such as a road foreman or MTO have a cell phone turned on and/or use it while riding in the controlling locomotive?**

A. No. Supervisors are required to comply with the regulation in the same manner as an operating employee.

**15. Q. We are stopped in a siding waiting to meet an opposing train. May I use my cell phone?**

A. Yes, so long as no member of the crew will foul any track and all crewmembers confirm the call or text messaging will not interfere with any safety related or required duties.

**16. Q. While operating a moving train as an engineer, may I use a digital watch to check the accuracy of my speedometer?**

A. Yes. A digital watch whose only purpose is a timepiece is not restricted or prohibited for this use.

**17. Q. While operating the controls of a moving locomotive, may I use an electronic device to control remote locomotives in my train?**

A. Yes. Electronic control systems and information displays within the locomotive cab or on a remote control transmitter necessary to operate a train or conduct switching operations are not prohibited or restricted.

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**Steve was admitted to the state bar in 1993 and limits his law practice to representing injured railroad workers. He has the unique honor of being the only attorney in Texas designated by both the BLET and UTU. He is AV rated with the highest possible legal and ethical standards in the legal profession.**

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<sup>i</sup> May 28, 2002 – accident at Clarendon, Texas - The engineer of the train at fault was on his cell phone as the train exited a siding and thus overran a meet causing a head on collision in dark territory. One engineer died and the other three crew members were injured.

<sup>ii</sup> September 12, 2008 – the engineer was texting a young woman and ran a red signal, proceeding into the path of an oncoming Union Pacific freight train.

<sup>iii</sup> Emergency Order 26 was placed into effect on October 1, 2008

<sup>iv</sup> The new regulation is codified as 49 CFR Part 220, Electronic Devices

<sup>v</sup> See 49 C.F.R. 220.311

<sup>vi</sup> See 49 C.F.R. 220.209