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OSHA Docket Office
Docket No. OSHA-2015-0012 [RIN No. 1218-AD07]
Technical Data Center
U.S. Department of Labor
Room N-3653
200 Constitution Ave. NW
Washington, D.C. 20210

*CHERRY HILL, NJ
**HONOLULU, HI
PHILADELPHIA, PA
by appointment only

**Partner responsible – John F. Gullace*
***Partner responsible – Brenda H. Gotanda*

Re: Comments on Proposed Rule on Cranes and Derricks in Construction: Railroad
Roadway Work
Docket No. OSHA-2015-0012

To Whom It May Concern:

We are writing on behalf of our client the Association of American Railroads¹ and certain member railroads² (hereinafter collectively referred to as “AAR”) to provide comments on the Occupational Safety and Health Administration (“OSHA”) Notice of Proposed Rulemaking titled “Cranes and Derricks in Construction: Railroad Roadway Work” (the “Proposed Rule”), which was published in the Federal Register on July 19, 2018. 83 Fed. Reg. 34076 (July 19, 2018). The deadline for submitting comments is September 17, 2018. As explained in the Preamble to the Proposed Rule, the Proposed Rule is the result of AAR’s filing of a Petition for Review to OSHA’s Cranes and Derricks in Construction Standard (the “Crane Standard”) issued in final on August 9, 2010, and a subsequent negotiated settlement to resolve that litigation. The settlement between AAR and OSHA was executed in September 2014, and contains the draft regulatory language found in the Proposed Rule. Subsequently, on November 7, 2014, the Federal Railroad Administration (“FRA”) issued final regulations involving training standards for safety-related

¹ AAR is a trade association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

² The member railroads that participated in challenging OSHA’s crane and derricks final rule and in the subsequent settlement include BNSF Railway Company; CSX Transportation, Inc.; Dakota Minnesota & Eastern Railroad Corporation, Delaware and Hudson Railway Company, Inc., and Soo Line Railroad Company (collectively d/b/a Canadian Pacific); Illinois Central Railroad Company; Norfolk Southern Railway Company; and Union Pacific Railroad Company.

railroad employees and specifically addressed “roadway maintenance machines equipped with a crane.” Thus, while AAR supports the settlement it reached with OSHA, it asserts that certain provisions of the Proposed Rule should be revised to recognize the legal effect of FRA’s subsequently issued regulations.

I. Application of OSH Act §4(b)(1) to the OSHA Crane Standard

A. General Background

As recognized in the Preamble to the Proposed Rule, the focus of the OSHA Crane Standard has always been on cranes used at typical, static construction sites and the issues and accidents that have been experienced by the construction industry in connection with those cranes. Notably, no representative from the railroad industry was part of the negotiated rulemaking committee from which the OSHA Crane Standard was generated. As OSHA also acknowledges, there is a “lack of a record of significant injuries or fatalities resulting from the use of cranes or derricks for railroad track construction and maintenance.” 83 Fed. Reg. 34078. As a result, at the time the Crane Standard was proposed, AAR and at least one other railroad submitted comments proposing an exemption from the Crane Standard for railroad “roadway maintenance machines.”³

On August 9, 2010, OSHA issued the final Crane Standard with no specific exemptions for roadway maintenance machines. At that time, FRA was still in the process of working with its Railroad Safety Advisory Committee to, among other things, develop training standards and qualification plans for safety-related railroad employees. In negotiations that occurred after AAR filed its Petition for Review, AAR asserted that training and certification of roadway maintenance machine operators was best addressed through the FRA, and its regulations, as it is more keenly aware of the unique safety issues and challenges presented in the railroad industry. As described by OSHA in the Preamble, meetings were held among FRA, OSHA, AAR and union representatives regarding the advisability of FRA issuing specific regulations covering the training and certification of roadway maintenance machine operators. However, at the time that the settlement between AAR and OSHA was reached, the final regulations from FRA had not yet been issued. Accordingly, the settlement reflected in the Proposed Rule was based on an understanding of what subsequent FRA regulations would cover.

³ FRA’s regulations define “roadway maintenance machine” as “a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.” 49 CFR § 214.7. The “cranes” used by the railroad industry for track and bridge work meet the definition of roadway maintenance machine.

On November 7, 2014, FRA issued final regulations that specifically cover the training and qualification of roadway maintenance machines equipped with a crane, as well as training, qualification, and oversight for all safety-related railroad employees. *See* 79 Fed. Reg. 66460 (November 7, 2014). Once final safety regulations have been issued by another federal agency, the effect of these regulations must be considered in determining the appropriate scope of any 4(b)(1) preemption from OSHA regulations.

B. FRA Regulations Issued in November 2014 Preempt the Application of Portions of the OSHA Crane Standard to Roadway Maintenance Machines and Their Operators.

Section 4(b)(1) of the Occupational Safety and Health Act (“OSH Act”) makes clear that there are limits to its applicability:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, . . . , exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1) (OSH Act § 4(b)(1)). Under the Federal Railroad Safety Act and other railroad statutes, the Secretary of Transportation, through the FRA, has the authority to prescribe regulations and issue orders for every area of railroad safety. 49 U.S.C. § 20103. Under 4(b)(1) of the OSH Act, if the FRA exercises its statutory authority over an area of railroad safety, OSHA is preempted and has no jurisdiction. *See Consolidated Rail Corp.*, 16 O.S.H. Cas. (BNA) 1033 (O.S.H.R.C. Mar. 31, 1993). So, as recognized in the Preamble to the Proposed Rule, when FRA promulgated its own training requirements for operators of “roadway maintenance machines equipped with a crane,” “[t]his FRA action has the effect of prohibiting OSHA, under section 4(b)(1) of the OSH Act, from enforcing its operator certification requirements with respect to operators of roadway maintenance machines (including roadway maintenance machines used for bridge construction).” 83 Fed. Reg. 34079.

In understanding the scope of the “working conditions” over which FRA has “exercised its statutory authority,” it is important to look at the language of FRA’s regulations and its stated intent in issuing those regulations. In November 2014, FRA added a new definition for “roadway maintenance machines equipped with a crane,” which it defined as “any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load,” and also added a new Section 214.357 entitled “Training and Qualification for Operators of Roadway Maintenance Machines Equipped with a Crane.” 79 Fed. Reg. 66474 & 66475. These regulations, which came into effect after the settlement between AAR and OSHA was executed, specifically address the subject matter of the settlement.

In order to make clear the intended preemptive effect of its November 2014 regulations, in the preamble to those regulations FRA specifically stated: “Once this rule is effective, FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA’s regulation related to crane operator qualification and certification found at 29 CFR 1926.1427.” 79 Fed. Reg. 66475.

Thus, whether or not OSHA includes a specific exemption for roadway maintenance machines in its regulations, the effect of FRA’s regulations is to occupy this area and preempt significant portions of OSHA’s Crane Standard and OSHA’s enforcement of these regulations against the railroads.

Nonetheless, AAR asserts, and agrees with OSHA, that it is still appropriate to include an explicit exemption for roadway maintenance machines in the OSHA Crane Standard. The combined experience of AAR reveals that OSHA inspectors are not always familiar with FRA regulations and the relative jurisdiction of what is covered by FRA versus OSHA. Similarly, certain railroads (or their contractors) may not be familiar with the preemptive effect of FRA’s regulations in this area. Accordingly, having an explicit exemption that specifies those portions of the OSHA Crane Standard that are not applicable to roadway maintenance machines will prevent needless disputes and potential litigation in this area.

1. OSHA’s operator qualification, certification and training requirements are preempted by FRA’s regulations.

As noted above and in OSHA’s Preamble, there can be no question that 49 CFR § 214.357, regarding training and qualification for operators of roadway maintenance machines equipped with a crane, “has the effect of prohibiting OSHA . . . from enforcing its operator certification requirements with respect to operators of roadway maintenance machines,” and “all aspects of operator training.” 83 Fed. Reg. 34079. Accordingly, AAR fully supports proposed § 1926.1442(b)(1), which exempts roadway maintenance machines from § 1926.1427 (Operator qualification and certification) and §1926.1430 (Training) requirements. This section simply acknowledges the legal effect of the FRA regulations, and it would be appropriate and helpful if this exemption were specifically stated in the OSHA Crane Standard.

2. FRA’s regulations equally prohibit OSHA from enforcing its own regulations against roadway maintenance machine operators involved in bridge construction.

OSHA’s Preamble is internally inconsistent in that in Section D discussing § 1926.1442(b)(1), it acknowledges that FRA’s regulation has the effect of prohibiting OSHA under Section 4(b)(1) of the OSH Act from enforcing its operator certification requirements with

respect to operators of roadway maintenance machines “(including roadway maintenance machines used for bridge construction).” *Id.* (emphasis added). Yet, in the previous section of the Preamble, entitled “C. Scope of New § 1926.1442,” OSHA explains why it made a distinction between roadway maintenance machines engaged in “bridge work” and roadway maintenance machines engaged in other track work. As explained above, at the time that the settlement between OSHA and AAR was reached, FRA’s regulations were not yet final. During negotiations, OSHA expressed the view, described in the Preamble, that bridge construction work performed by roadway maintenance machines was more akin to typical construction work and so should be covered by the OSHA regulations. However, now that the FRA regulations have been issued in final, it is apparent that FRA regulations also cover bridge construction work. The definition of roadway maintenance machine specifically covers bridge construction. Accordingly, the definition of roadway maintenance machine equipped with a crane also covers roadway maintenance machines used for bridge construction.

OSHA does not have the authority to pick and choose which portions of the FRA regulations it likes and does not like, even if it would choose to regulate an area differently than FRA has chosen to do. Once FRA has exercised its statutory authority to prescribe regulations in this area, OSHA is preempted and no longer has the ability to enforce its own regulations in the same area. Accordingly, the distinction found in proposed § 1926.1442(a) for bridge construction work is no longer appropriate and not legally accurate. Accordingly, AAR proposes that § 1926.1442 be revised to apply to all railroad roadway maintenance machines. *See* Attachment A for proposed revisions.

3. OSHA’s proposed regulations requiring employers’ ongoing evaluation of crane operators is addressed by FRA’s regulations and should be included in the § 1926.1442 railroad roadway maintenance machines exemptions.

On May 21, 2018, OSHA proposed other revisions to the OSHA Crane Standard to, among other things, specify that an employer has an ongoing obligation to evaluate a crane operator’s competency (and not simply rely on a third party’s certification). To the extent these regulations become final, AAR agrees with OSHA that FRA’s regulations encompass the evaluation and assessment of roadway maintenance machine operators. Thus, FRA has occupied this area and OSHA is preempted from enforcing the proposed regulations concerning ongoing evaluations against employers of railroad roadway maintenance machine operators.

FRA’s regulation on roadway maintenance machines equipped with a crane, 49 CFR § 214.357, specifies that an employer’s training and qualification program “shall require initial and periodic qualification of each operator of a roadway maintenance machine equipped with a crane and shall include: (1) Procedures for determining that the operator has the skills to safely

operate each machine the person is authorized to operate; and (2) Procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. . . .” 49 CFR § 214.357(b)(1)&(2).⁴ The procedures referenced in the FRA regulation constitute a way of evaluating the operator’s knowledge and proficiency. Thus, FRA has prescribed regulations on this topic thereby preempting OSHA from enforcing its own regulations in this area.

Since the proposed OSHA regulations imposing the additional obligation of an employer evaluation are found in several regulations, new section 1926.1442 should reference all of these sections as being inapplicable to roadway maintenance machines. The proposed sections that should be exempted under § 1926.1442 include: § 1926.1427 (Operator training, certification, and evaluation); § 1926.1430 (Training); § 1926.1436(q) (Derricks); § 1926.1440(a) (Sideboom cranes); and § 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less). *See* Attachment A for proposed revisions.

As noted above, AAR supports having specific exemptions that recognize the effect of Section 4(b)(1) of the OSH Act so there is no confusion or needless litigation over the agencies’ relative jurisdictions.

4. FRA’s regulations, covering the topic of manufacturer’s guidance and when safety instructions are developed to replace manufacturer’s guidance, preempt portions of the Crane Standard and of proposed § 1926.1442(b)(6) and (7).

In the FRA regulations issued on November 7, 2014, FRA expanded the definition of “roadway maintenance machine” by adding the following to subsection (b):

(b) * * *

(2) No roadway worker shall operate a roadway maintenance machine without having knowledge of the safety instructions

⁴ At the same time that FRA issued 49 CFR § 214.357, it also issued a set of regulations found at 49 CFR Part 243, which specify training, qualification and oversight requirements for all safety-related railroad employees. Roadway maintenance machine operators meet the definition of “safety-related railroad employee.” *See* 49 CFR § 243.5. Under 49 CFR § 243.205, an employer must adopt and comply with a program to conduct periodic oversight tests and inspections to determine if safety-related railroad employees comply with Federal requirements. Accordingly, employers of roadway maintenance machine operators are required to perform regular evaluations of these employees under this regulation as well.

applicable to that machine. For purposes of this paragraph, the safety instructions applicable to that machine means:

- (i) The manufacturer's instruction manual for that machine; or
- (ii) The safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

Accordingly, the FRA regulations now address when roadway maintenance machine operators must follow manufacturer's instruction manuals and how safety instructions can be developed to replace the manufacturer's safety instructions. Thus, the portions of the Crane Standard requiring compliance with manufacturer's guidance, and the portions of the Proposed Rule (proposed sections 1926.1442(b)(6) and (7)) which impose procedural prerequisites for when the requirements to follow manufacturer's guidance do not apply, are all preempted by FRA's regulations. Since FRA has chosen to address the issue of manufacturer's guidance and how it will allow departure from that guidance, OSHA's jurisdiction is preempted and it cannot enforce its own prerequisites in this area. *See* Attachment A for proposed revisions.

5. Revisions to proposed § 1926.1442.

Based on all of the above, in order to recognize the impact of the FRA regulations issued in November 2014 that cover much of the subject matter addressed by the OSHA Crane Standard, AAR proposes a modified version of proposed § 1926.1442, as set forth in Attachment A to this letter.

II. AAR's Responses to OSHA's Request for Comments

The follow sections respond to OSHA's requests for public comment on specific provisions of the Proposed Rule.

A. Proposed Exemption for Flash-Butt Welding Trucks and Equipment with Similar Attachments Is Appropriate.

For the reasons stated in the Preamble, flash-butt welding trucks and other roadway maintenance machines with low-hanging workhead attachments should be exempted from the requirements of the OSHA Crane Standard and so should be added to the equipment specifically exempted under § 1926.1400(c). This equipment has limited hoisting ability and function. This

equipment does not present the type of hazard that OSHA intended to address in the Crane Standard and is akin to other equipment currently listed under § 1926.1400(c).

B. OSHA Should Clarify Proposed § 1926.1442(b)(2)(iii) to Explicitly Exempt Employers Who Are Subject to 49 CFR § 214.307(b) from Compliance with 29 CFR § 1926.1424(a)(2) (Work area controls).

The current language of proposed § 1926.1442(b)(2)(iii) suggests that railroads are only exempted from the requirements of § 1926.1424(a)(2) (concerning work-area controls) if they have implemented an FRA-approved on-track safety program in accordance with 49 CFR § 214.307(b). However, as explained above and recognized by OSHA in the Preamble, having issued regulations that address the types of hazards on which this section of OSHA's Crane Standard is focused, "FRA's program preempts the work-area-control requirements in OSHA's crane standard based on the preemption provisions of 4(b)(1) of the OSH Act." 83 Fed. Reg. 34080. Employers subject to FRA's jurisdiction should only be subject to enforcement from one agency, and the OSHA regulations should not be drafted in a way that leads to confusion regarding which federal agency has jurisdiction. Accordingly, proposed section 1926.1442(b)(2)(iii) should be revised to clarify that employers that are subject to FRA's on-track safety program requirements are exempt from 29 CFR § 1926.1424(a)(2). *See Attachment A for proposed revisions.*

C. AAR Supports Proposed § 1926.1442(b)(3)(i) and (ii), and Does Not Believe Additional Guidance Is Necessary Regarding the Scope of Adjustments that Can Be Made by a Qualified Person or the Scope of the Approval for Out-of-Level Work.

In the Preamble, OSHA accepts that a prohibition on out-of-level work is not practical for railroad roadway track work and acknowledges that the existing exception in § 1926.1402(f) (which includes only equipment traveling on the tracks) is not broad enough to address the out-of-level work encountered by roadway maintenance machines that travel next to track. Thus, AAR supports this exemption, although again some of these requirements may be preempted by the safety programs to be developed under 49 CFR Part 243. However, since some of these requirements relate to the equipment itself, AAR believes this exemption still has application and is helpful. AAR also believes OSHA's proposed movement of the parenthetical to follow "those indicators" is appropriate and clearer. Finally, AAR does not believe that additional guidance is necessary on "the types of adjustments that a qualified person may make and the extent to which the manufacturer or RPE [registered professional engineer] must spell out its approval of out-of-level work." 83 Fed. Reg. 34081. AAR is concerned that such guidance could be too limiting and believes the scope of such approvals is better left to the railroad industry.

D. The Proposed “Grandfathering” Provisions in § 1926.1442(b)(3) Are Appropriate.

Proposed section 1926.1442(b)(3) contains a “grandfathering” provision that exempts roadway maintenance machines from all out-of-level prohibitions if the machines were purchased before OSHA’s Crane Standard took effect on November 8, 2010. Much of the railroad industry’s equipment consists of older machines, so it would be extremely costly to obtain manufacturer or RPE approval for out-of-level work for such a significant quantity of equipment. Additionally, OSHA is proposing a “grandfathering” provision for the requirements in section 1926.1415(a)(1) that all covered equipment have a built-in level or a level available on the equipment and that employers inspect such level indicator to confirm that it is functioning properly. Most roadway maintenance machines were manufactured before OSHA’s Crane Standard was promulgated in 2010, and are not equipped with level indicators. Thus, it would be extremely costly to retrofit the machines. AAR supports the addition of both “grandfathering” provisions because roadway maintenance machines have been performing out-of-level work with no level indicators for decades and there is no suggestion that such out-of-level work is associated with any increased accidents. As recognized by OSHA, out-of-level work is a necessary situation for railroads.

In conclusion, AAR supports the exemptions in the Proposed Rule and the changes made pursuant to the settlement agreement between OSHA and AAR. However, the Proposed Rule should be modified to recognize the preemptive effect of the FRA regulations issued in November 2014. AAR appreciates the opportunity to provide these comments on the Proposed Rule on Cranes and Derricks in Construction: Railroad Roadway Work.

Sincerely,

A handwritten signature in black ink, reading "Jill Hyman Kaplan". The signature is fluid and cursive, with the first and last names being more prominent.

Jill Hyman Kaplan
For MANKO, GOLD, KATCHER & FOX, LLP

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ATTACHMENT A to Settlement Agreement Between OSHA and AAR

1. Amend §1400(c) by adding paragraph (18) to read as follows:

(c) Exclusions. This subpart does not cover:

* * *

(18) Flash-butt welding trucks or other roadway maintenance machines not equipped with any hoisting device other than that used to suspend and move a welding device or workhead assembly. For purposes of this exclusion, a flash-butt welding truck and roadway maintenance machine refer to railroad equipment that meets the definition of “Roadway Maintenance Machine” in 49 CFR 214.7 and are used only for railroad track work.

2. Redesignate §1442 (Severability) as §1443 (Severability).

3. Add 1442 to read as follows:

§1926.1442 Railroad roadway maintenance machines.

Employers using equipment covered by this subpart CC that meets the definition of “Roadway Maintenance Machine,” as defined in 49 CFR 214.7, must comply with the requirements in this subpart CC, except as provided in paragraphs (a) through (g) of this section:

- (a) Operator training, certification and evaluation. The requirements in §§1427 (Operator [training], certification, [and evaluation]) and 1430 (Training) do not apply. The evaluation requirements contained in §§ 1926.1436(q) (Derricks), 1926.1440(a) (Sideboom cranes) and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) do not apply.
- (b) Rail clamps, rail stops, and work-area controls.
 - (i) The requirement for rail clamps in §1415(a)(6) does not apply;
 - (ii) The requirement for rail stops in §1415(a)(6) does not apply; and
 - (iii) The work-area controls specified by §1424(a)(2) do not apply when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b).
- (c) Out-of-level work. The restrictions on out-of-level work and the requirements for crane-level indicators and inspections of those indicators (including the requirements in §§1926.1402(b), 1926.1412(d)(1)(xi), and 1926.1415(a)(1)), do not apply when the employer uses equipment purchased before November 8, 2010, or when:
 - (i) The manufacturer approves or modifies the equipment for out-of-level operation, or a registered professional engineer who is a qualified person with respect to the equipment involved approves such out-of-level work; and
 - (ii) The employer uses the equipment within limitations specified by the manufacturer or the registered professional engineer, or a qualified person modifies the load chart for such approved out-of-level work and the employer uses the equipment in accordance with that load chart.
- (d) Dragging a load sideways. The prohibition in §1417(q) on dragging a load sideways does not apply.

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- (e) Boom-hoist limiting device. The requirement in §1416(d)(1) for a boom-hoist limiting device does not apply to Roadway Maintenance Machines when the cranes use hydraulic cylinders to raise the booms.
- (f) Manufacturer guidance for modifications covered by §1434. The requirements to follow the manufacturer's guidance set forth in §1434 do not apply if the employer is subject to the requirements of 49 CFR Part 214.
- (g) Other manufacturer guidance. The requirements to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications, set forth in §§1404(j), (m), or (q); 1415(a)(6); 1417(a), (r), (u), or (aa); 1433(d)(1)(i); or 1441 do not apply if the employer is subject to the requirements of 49 CFR Part 214.