Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)
Pacific Telesis Group (PacTel)
Paul Lee (Lee)
Peggy Orlic (Orlic)
Pennsylvania Office of Consumer Advocate
Pennsylvania Public Utility Commission (Pennsylvania PUC)
Public Utilities Commission of Ohio
Rural Telephone Coalition
Scherer Communications Group
SBC Communications, Inc. (SBC)
Southern New England Telephone Company (SNET)
Sprint Corporation (Sprint)
State of Alaska (Alaska)
State of Hawaii (Hawaii)
TCA, Inc.
TDS Telecommunications Corp.
Telecommunications Resellers Association (TRA)
United States Telephone Association (USTA)
U.S. West, Inc. (U.S. West)
Vanguard Cellular Systems, Inc.
Washington Utilities & Transportation Commission
Zankle Worldwide Telecom (ZWT)

List of Reply Commenters in CC Docket No. 96–61, Sections IV, V, VI (Market Definition, Separation Requirements, Rate Averaging and Rate Integration)

ALLTEL Corporate Services, Inc.
Ameritech
AT&T Corp. (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corp. (BellSouth)
Citizens Utilities Company (Citizens Utilities)
Commonwealth of the Northern Mariana Islands
Competitive Telecommunications Association (CompTel)
General Communication, Inc. (GCI)
General Services Administration (GSA)
GTE Service Corp. (GTE)
Governor of Guam & the Guam Telephone Authority
Guam Public Utility Commission (Guam PUC)
LDDS WorldCom (LDDS)
MCI
MFS
Missouri Office of the Public Counsel
New York State Department of Public Service
NYNEX Telephone Companies (NYNEX)
Office of the Ohio Consumers Counsel (Ohio Consumers' Counsel)
PCI Communications, Inc.
Rural Telephone Coalition
SBC Communications Inc. (SBC)
Sprint Corporation (Sprint)
State of Alaska (Alaska)
State of Hawaii (Hawaii)
Telecommunications Resellers Association (TRA)
United States Telephone Association (USTA)
U.S. West, Inc. (U.S. West)
Vanguard Cellular Systems, Inc.

[FR Doc. 96–29529 Filed 11–21–96; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[FRA Docket No. RAR–4, Notice No. 14]

RIN 2130–AA58

Railroad Accident Reporting

AGENCY: Federal Railroad Administration (FRA, DOI).

ACTION: Final rule; Correcting amendments and partial response to petitions for reconsideration.

SUMMARY: On June 18, 1996, FRA published a final rule amending the railroad accident reporting regulations. FRA now makes technical corrections to the final rule and responds to certain concerns raised in petitions for reconsideration of the final rule, which concerns were also raised in requests to stay the effective date of the final rule. In this document FRA issues amendments to the final rule addressing those concerns. FRA's response to the other concerns raised in petitions for reconsideration of the final rule will appear in the near future in a separate document published in the Federal Register.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Robert L. Finkelstein, Staff Director, Office of Safety Analysis, Office of Safety, FRA, 400 Seventh Street, SW., Washington, D.C. 20590 (telephone 202–632–3386); or Nancy L. Goldman, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, D.C. 20590 (telephone 202–632–3167).

SUPPLEMENTARY INFORMATION: On June 18, 1996, FRA published a final rule amending the railroad accident reporting regulations at 49 CFR part 225 (61 FR 30940). The final rule aims to minimize underreporting and inaccurate reporting of those injuries, illnesses, and accidents meeting reportability requirements. On August 19, 1996, and August 29, 1996, respectively, the Association of American Railroads (AAR) and the Union Pacific Railroad Company (UP) filed petitions for reconsideration of the final rule raising various concerns and requested in their petitions for reconsideration, and by purported petitions for stay not recognized by FRA regulations at 49 CFR part 211, that FRA postpone the effective date of the final rule (collectively, Petitions). The Petitions specifically allege:

- That AAR member railroads will be exposed to substantial risk should the rule not be stayed pending FRA's decision on AAR's Petition for Reconsideration; and
- That the text of the final rule may allow employees access to records and files which the railroads may deem to be privileged, confidential, and litigation-sensitive, thus giving employee litigants advantages that could expose railroads to irreparable injury.

1. Requests To Stay the Effective Date

As stated above, AAR and UP request in their Petitions that FRA stay the effective date of the final rule, asserting that such a stay is in the public interest and that other interested parties would not be substantially harmed by such a stay since the rule does not address ''any significant safety risk.'' AAR claims that its member railroads will be exposed to substantial risk should the rule not be stayed pending FRA's decision on AAR's Petition for Reconsideration. Section 211.31 of FRA's rules of practice states that FRA must decide to grant or deny, in whole or in part, each petition for reconsideration not later than four months after receipt by FRA's Docket Clerk (49 CFR 211.31). In this case, FRA's decision on the petitions for reconsideration is due no later than December 19, 1996. AAR and UP therefore request an immediate stay of the effective date for a reasonable period of time after issuance of FRA's decision on the Petitions for Reconsideration in order to assess FRA's decision and evaluate how FRA's decision impacts the final rule. In the alternative, AAR and UP request postponement of the effective date of the final rule from January 1, 1997, to January 1, 1998.

Discussion

After careful consideration and for the reasons set forth in this document, FRA has decided not to stay the effective date of its final rule. FRA so informed AAR and UP by letter dated October 10, 1996. Initially, FRA wishes to emphasize that its rules of practice applying to rulemakings do not authorize petitions for stay of a final rule. *See* 49 CFR part 211. Since procedures do not exist with respect to a stay petition, there exists no regulatory deadline by which to answer such a petition, and FRA's response to AAR's and UP's purported petitions for stay (''Petitions for Stay'') did not constitute a final agency action subject to review. It should also be noted that the filing of a petition for reconsideration does not stay the effectiveness of a rule under 49 CFR 211.29. Nevertheless, FRA chose to reply to the substantive issues in AAR's and UP's ''Petitions for Stay'' in order to

maintain and foster the collaborative and cooperative partnership approach to resolving issues important to the industry.

FRA is also confident that railroads were given ample time to prepare to comply with the final rule, given the amount of time between its publication (June 18, 1996) and its effective date (January 1, 1997). Those subject to a Federal rule are not entitled to predicate their actions on the assumption that a petition for reconsideration will result in substantive changes to the rule. The public interest would not be served by delaying the effective date of this rule at this time, based on FRA's review of the grounds set forth in the ''Petitions for Stay.'' Therefore, if, in responding to pending petitions for reconsideration of the final rule from AAR, UP, or others, FRA makes any additions or changes to the final rule, then FRA will allow the railroads sufficient time and latitude to comply with any revised provisions. In the meantime, the industry should plan to comply on the original effective date of January 1, 1997.

2. Section 225.25(c) Recordkeeping

Current Final Rule Language

Section 225.25(c) reads as follows:

Each railroad shall provide the employee, upon request, a copy of either the completed Railroad Employee Injury and/or Illness Record (Form FRA F 6180.98) or the alternative railroad-designed record as described in paragraphs (a) and (b) of this section as well as a copy of any other form, record or report filed with FRA or held by the railroad pertaining to the employee's injury or illness.

As noted, the Petitions contend that this section would allow railroad employees access to records and files which the railroad may deem to be privileged, confidential, and/or litigation-sensitive. AAR claims that the portion of § 225.25(c) that would allow employees access to ''a copy of any other form, record or report filed with FRA or held by the railroad pertaining to the employee's injury or illness,'' may give employee litigants advantages that could expose railroads to irreparable injury. UP states that by means of § 225.25(c), FRA was trying to ''preempt [Federal Employers' Liability Act (45 U.S.C. 51 *et seq.*)] FELA case law, FELA statutory language, the Federal Rules of Civil Procedure, and the jurisdiction of the judiciary itself.'' Similarly, AAR states that § 225.25(c) ''purports to overturn the Federal Rules of Civil Procedure and other statutory protections by requiring railroads to open their files and give privileged documents to potential and actual plaintiff-employees'' and that the section was unlawful and in violation of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) because FRA failed to give public notice of this provision and allow opportunity for comment. UP further questions how employee access to medical files would assist FRA in improving railroad safety.

AAR states that the adverse effects of the final rule are:

(1) To interfere irrevocably with full and frank disclosure between attorney and client which is critical to the functioning of the adversary system, by mandating release of attorney-client communications that had been made in the past and would have been made in the future with an expectation of confidentiality,

(2) To undermine irrevocably the protections that are accorded accident reports under 49 U.S.C. 20903 in order to avoid their use for any adversarial purpose, by mandating release of such reports, and

(3) To undermine irrevocably the railroads' rights to confidentiality of other privileged and litigation-sensitive documents, by mandating their release.

Discussion and Amended Final Rule

AAR's assertion that FRA failed to give notice and an opportunity to comment on the provision in § 225.25(c) is without merit. In the railroad accident reporting Notice of Proposed Rulemaking (NPRM), published in the Federal Register on August 19, 1994 (59 FR 42880), FRA proposed in § 225.39(b) that each railroad provide the worker whose injury or illness is reported on the Railroad Worker Injury and Illness Log, with a copy of such log within seven calendar days of completing the log. The preamble to the NPRM explained FRA's concern with the fact that the injured or ill employee did not have the opportunity to review and verify the information the railroad submitted on accident/illness reports prior to submission of such reports to FRA.

The preamble to the final rule further explained the agency's rationale for issuing these regulations. FRA believes that to the extent it concerns documents required by FRA to be maintained or submitted, the requirement in § 225.25(c) is necessary in order to provide the injured or ill employee a means by which to review and verify the reporting status of his or her injury or illness. By providing this requested information, the employee would have the opportunity to assess why, or why not, a particular event was, or was not, reported to FRA. By including the employee in this process, the overall integrity of FRA's data base would improve. The accuracy of railroad accident and injury data is essential to improving the safety of railroad employees and the railroad industry as a whole. Further, a reliable and accurate railroad injury and accident reporting data base is critical to formulating effective rail safety policies and regulations.

In writing the final rule, however, FRA never intended to negate the well-established litigation privileges with respect to the type of documents railroad employee litigants may obtain from the railroads. The final rule better defines the types of documents to which employees may obtain access, and is a logical outgrowth of the proposed regulation.

FRA is amending § 225.25(c) to clarify that railroads are required to grant a railroad employee access only to forms or reports required to be maintained or filed under Part 225 pertaining to that employee's own work-related injury or illness. Thus, the amended final rule cannot be read to provide employees access to any other documents in the railroad's files; nor can the revised language be interpreted to deny employees access to such documents. Such access would be an issue between the employee and the railroad. The accident reports statute (49 U.S.C. 20102, 20901–20903, 21302, 21304, 21311) does not preclude disclosure of such documents; instead that statute precludes the ''use'' of such documents in lawsuits for damages of certain accident reports. This distinction between the public availability of accident/incident reports and their use in litigation is clearly made in § 225.7 of both the current and amended final rule.

3. Section 225.35 Access to Records and Reports

Current Final Rule Language

AAR's petition for reconsideration asserts that the following portion of § 225.35 is unlawful because FRA failed to give public notice of this provision and allow opportunity for comment and that the provision would allow FRA and ''other authorized representatives'' access to any document or record without regard to any claim of privilege:

Each railroad subject to this part shall have at least one location, and shall identify each location, where any representative of the Federal Railroad Administration or of a State agency participating in investigative and surveillance activities under part 212 of this chapter or any other authorized representative, has centralized access to a copy of any record and report (including relevant claims and medical records) required under this part, for examination and

photocopying in a reasonable manner during normal business hours.

Discussion

AAR's assertion that FRA failed to give notice and an opportunity to comment on this provision in § 225.35 is without merit. In the accident reporting NPRM, FRA proposed in § 225.41 that all reports, logs, plans, and records related to (a) rail equipment accidents/incidents, including collisions and derailments; (b) highway-rail grade crossing accidents/incidents; (c) deaths, injuries, and illnesses, including claims and medical records; as well as all records and reports identified in § 225.25, must be made available, upon request, to any FRA representatives, or any representative of a State participating in investigative and surveillance activities under the Federal railroad safety laws and regulations, for examination and photocopying in a reasonable manner during normal business hours. The final rule provision in § 225.35 adds ''any authorized representative'' to the list of persons who may obtain access to railroad documents only to distinguish ''FRA inspectors'' from ''FRA management staff'' who may sometimes accompany FRA inspectors and specialists during routine inspections.

As stated in the preamble to the NPRM and the final rule, FRA believes that § 225.35 would alleviate the problems and reluctance that FRA inspectors frequently encounter from the railroads when examining and photocopying claims department records, particularly railroad employee medical records.

Amended Final Rule

FRA grants, in part, AAR's request for reconsideration as to that portion of § 225.35 that would allow FRA and any other authorized representative access to ''any record and report (including relevant claims and medical records) required'' under the accident reporting regulations. FRA agrees that § 225.35 was inadvertently drafted in an overly broad manner and that it may be misinterpreted to require railroads to release all medical and claim-related records to FRA upon request without regard to any claim of privilege. FRA did not intend unlimited access to all documents contained in an employee's file or to deny railroads the opportunity to assert a privilege with respect to a particular document. There are instances, however, where FRA may deem it necessary to obtain a document in the railroad's possession or under the control of the railroad that may contain information relevant to aid its investigation into the cause of a railroad accident or incident or an employee's injury or illness. FRA has authority under 49 U.S.C. 20107 and 20902 to request and obtain such documents.

When confronted with such a request, railroads usually cooperate and provide FRA with the requested relevant documents. In rare instances, a railroad may assert that the requested documentation is privileged and may deny access to such records. Should the railroad assert such a legal privilege with respect to particular records, failure to provide FRA access to such records will not constitute a violation of this section. However, if the railroad refuses to release information that FRA deems relevant to its investigation, then FRA may consider it necessary to issue a subpoena for the production of documents in order to carry out its duty to enforce the federal railroad safety laws. If the railroad should then fail to produce any of the requested documents in the possession or under the control of the railroad for examination and photocopying, FRA may seek enforcement of the subpoena in federal district court. *See* 49 U.S.C. 20107 and 20902, delegated from the Secretary of Transportation by regulations of the Office of the Secretary at 49 CFR l.49(m), and the authority of 49 CFR 209.7(a) and 225.31(b). Of course, a railroad could raise its claim of privilege in any action to enforce a subpoena. Alternatively, should a railroad claim a legal privilege concerning such a document, the railroad could submit the document to FRA with a request for confidential treatment under 49 CFR 209.11.

Thus, § 225.35 is revised to clarify that FRA and other authorized representatives must have centralized access to records or reports required to be maintained or filed under part 225 and must have access to relevant claims and medical records and that should the railroad assert a legal privilege with respect to certain claims and medical records, failure to provide FRA access to such records would not violate this section. However, FRA may nevertheless use its subpoena power to obtain such records, and the railroad could contest that subpoena if it so chooses.

4. Technical Corrections

In the list of definitions in § 225.5, the definition for ''Accountable injury or illness,'' which appears on page 30968, column one, of the Federal Register issue of June 18, 1996, should read as a separate paragraph. The definition for ''Day of restricted work activity'' on page 30968, column two, of the Federal Register issue of June 18, 1996, erroneously makes reference to the fact that ''restricted'' is defined below. Thus, the parenthetical phrase ''(as defined below)'' is removed from the definition.

Section 225.33(a)(10)(ii) erroneously makes reference to paragraphs ''(a)(10)(i)(C)(D) (iii) and (iv)'' of that section. Section 225.33(a)(10)(ii) now reads as follows: ''A current organization chart satisfies paragraphs (a)(10)(i) (B), (C), and (D) of this section.''

Regulatory Impact

Executive Order 12866 and DOT Regulatory Policies and Procedures

The amendments to the final rule have been evaluated in accordance with existing regulatory policies and procedures and are considered to be a nonsignificant regulatory action under DOT policies and procedures (44 FR 11034; February 26, 1979). The amendments to the final rule also have been reviewed under Executive Order 12866 and are also considered ''nonsignificant'' under that Order.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities, unless the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The technical corrections to the final rule have no economic impact. The amendments to the final rule will have no new direct or indirect economic impact on small units of government, business, or other organizations. The amendments only clarify the well-established legal privileges with respect to the types of documents to which railroad employees, FRA inspectors, and other authorized representatives may obtain access from railroads. The clarifications actually provide regulatory relief to railroads and, as such, do not require any revision to the Regulatory Impact Analysis (RIA) produced for the final rule. No revision to the RIA is necessary because the burden was calculated based on FRA's original intentions of these requirements, which are now reflected in the amendments to the final rule.

Paperwork Reduction Act

There are no new information collection requirements associated with these amendments. Therefore, no estimate of a public reporting burden is required.

Environmental Impact

The amendments will not have any identifiable environmental impact.

Federalism Implications

The amendments to the final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

List of Subjects in 49 CFR Part 225

Railroad accident reporting rules, Railroad safety.

The Final Rule

In consideration of the foregoing, FRA amends part 225, title 49, Code of Federal Regulations to read as follows:

PART 225—[AMENDED]

1. The authority citation for part 225 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20901, 20902, 21302, 21311; 49 U.S.C. 103; 49 CFR 1.49(c), (g), and (m).

§ 225.5 Definitions. [Corrected]

2. In § 225.5, In the definition for ''Day of restricted work activity,'' the parenthetical phrase ''(as defined below)'' in the second and third lines of that definition is removed.

3. Section § 225.25(c) is revised to read as follows:

§ 225.25 Recordkeeping.

* * * * *

(c) Each railroad shall provide the employee, upon request, a copy of either the completed Railroad Employee Injury and/or Illness Record (Form FRA F 6180.98) or the alternative railroad-designed record as described in paragraphs (a) and (b) of this section as well as a copy of forms or reports required to be maintained or filed under this part pertaining to that employee's own work-related injury or illness.

* * * * *

§ 225.33 Internal Control Plans. [Corrected]

4. In § 225.33(a)(10)(ii), the reference to ''(a)(10)(i)(C)(D) (iii) and (iv)'' is revised to read ''(a)(10)(i) (B), (C), and (D)''.

5. Section 225.35 is amended by removing the parenthetical phrase ''(including relevant claims and medical records)'' in the first sentence and by adding after the first sentence the following:

§ 225.35 Access to records and reports.

* * * * *

Each railroad subject to this part shall also provide to any representative of the Federal Railroad Administration or of a State agency participating in investigative or and surveillance activities under part 212 of this chapter or any other authorized representative access to relevant medical and claims records for examination and photocopying in a reasonable manner during normal business hours. * * *

6. Section 225.35 is amended by adding two sentences to the end of that section to read as follows:

§ 225.35 Access to records and reports.

* * * Should a railroad assert a legal privilege with respect to certain claims and medical records, failure to provide FRA access to such records would not constitute a violation of this section. FRA retains the right to issue a subpoena to obtain such records under 49 U.S.C. §§ 20107 and 20902 and §§ 209.7(a) and 225.31(b) of this title, and the railroad may contest that subpoena.

Issued in Washington, D.C., on November 13, 1996.

Jolene M. Molitoris,

Federal Railroad Administrator.

[FR Doc. 96–29849 Filed 11–21–96; 8:45 am]

BILLING CODE 4910–06–P