DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 219, 225, and 240

[Docket No. FRA–2002–13221, Notice No. 1]

RIN 2130–AB51

Conforming the Federal Railroad Administration's Accident/Incident Reporting Requirements to the Occupational Safety and Health Administration's Revised Reporting Requirements; Other Amendments

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM) and request for comments.

SUMMARY: FRA proposes to conform, to the extent practicable, its regulations on accident/incident reporting to the revised reporting regulations of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor. This action will permit the comparability of data on occupational fatalities, injuries, and illnesses in the railroad industry with such data for other industries, will allow the integration of these railroad industry data into national statistical databases, and will enhance the quality of information available for railroad casualty analysis. In addition, FRA proposes to make certain other amendments to its accident reporting regulations unrelated to conforming to OSHA's revised reporting regulations. Finally, FRA proposes minor changes to its alcohol and drug regulations and locomotive engineer qualifications regulations in those areas that incorporate concepts from its accident reporting regulations.

DATES: (1) Written Comments: Written comments on the proposed rule must be received by November 8, 2002. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) Public Hearing: If any person desires an opportunity for oral comment, he or she should notify FRA in writing and specify the basis for the request. FRA will schedule a public hearing in connection with this proceeding if the agency receives a written request for hearing by November 8, 2002.

ADDRESSES: Anyone wishing to file a comment or request a public hearing should refer to the FRA docket and notice numbers (Docket No. FRA–2002–13221, Notice No. 1) in such comment or request. You may submit your comments and related material, or request for a public hearing, by only one of the following methods:

By mail to the Docket Management System, Department of Transportation, Room PL–401, 400 7th Street, SW., Washington, DC 20590–0001; or

Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.* For instructions on how to submit comments or a request for a public hearing electronically, visit the Docket Management System Web site and click on the ''help'' menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments and documents as indicated in this preamble will become part of this docket and will be available for inspection or copying at Room PL–401 on the Plaza Level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at *http://dms.dot.gov.*

For more detailed information on OSHA's revised reporting regulations, *see http://safetydata.fra.dot.gov/OSHA-materials.*

FOR FURTHER INFORMATION CONTACT: For technical issues, Robert L. Finkelstein, Staff Director, Office of Safety Analysis, RRS–22, Mail Stop 17, Office of Safety, FRA, 1120 Vermont Ave., NW., Washington, DC 20590 (telephone 202–493–6280). For legal issues, Anna L. Nassif, Trial Attorney, or David H. Kasminoff, Trial Attorney, Office of Chief Counsel, RCC–12, Mail Stop 12, FRA, 1120 Vermont Ave., NW., Washington, DC 20590 (telephone 202–493–6166 or 202–493–6043, respectively).

SUPPLEMENTARY INFORMATION: Note that, for brevity, references to a section in part 225 will omit ''49 CFR''; *e.g.* § 225.5.

Table of Contents for Supplementary Information

I . Overview of OSHA's Revised Reporting Regulations and FRA's Proposal

On January 19, 2001, OSHA published revised regulations entitled, ''Occupational Injury and Illness Recording and Reporting Requirements; Final Rule,'' including a lengthy preamble that explains OSHA's rationale for these amendments. *See* 66 FR 5916, to be codified at 29 CFR parts 1904 and 1952; *see also* 66 FR 52031 (October 12, 2001) and 66 FR 66943 (December 27, 2001) (collectively, OSHA's Final Rule). A side-by-side comparison of OSHA's previous reporting and recordkeeping provisions with OSHA's new requirements appears at Appendix A of this NPRM. OSHA's Final Rule became effective, with the exception of three provisions, on January 1, 2002. *See* 66 FR 52031; *see also* 67 FR 44037 (July 1, 2002) and 67 FR 44124 (July 1, 2002).

FRA's railroad accident/incident reporting regulations, which are codified at 49 CFR part 225 (part 225), include, among other provisions, sections that pertain to railroad occupational fatalities, injuries, and illnesses; these sections are consistent with prior OSHA regulations, with minor exceptions. These sections of FRA's accident/incident regulations that concern railroad occupational casualties should be maintained, to the extent practicable, in general conformity with OSHA's recordkeeping and reporting regulations to permit comparability of data on occupational casualties between various industries, to allow integration of railroad industry data into national statistical databases, and to improve the quality of data available for analysis of casualties in railroad accidents/incidents. Accordingly, FRA proposes conforming amendments to its existing accident/incident reporting regulations and Guide. Further, FRA proposes minor amendments to its alcohol and drug regulations (49 CFR part 219) (part 219) and locomotive engineer qualifications regulations (49 CFR part 240) (part 240) in those areas that incorporate terms from part 225.

Note: Throughout this preamble to the proposed rule, excerpts from OSHA regulations are provided for the convenience of the reader. The official version of the OSHA regulations appears in 29 CFR part 104.

In addition, FRA proposes to draft a memorandum of understanding (MOU) between FRA and OSHA to address specific areas that are unique to the railroad industry, and where it may not be practical for FRA's regulations to be maintained in conformity with OSHA's Final Rule. Such divergence from OSHA's Final Rule is permitted under a provision of the rule:

> If you create records to comply with another government agency's injury and illness recordkeeping requirements, *OSHA will consider those records as meeting OSHA's Part 1904* recordkeeping requirements *if OSHA accepts the other agency's records under a memorandum of understanding* with that agency, *or if the other agency's records contain the same information* as this Part 1904 requires you to record.

Emphasis added. *See* 29 CFR 1904.3. Specific provisions of part 225 that do not or may not conform to OSHA's Final Rule are discussed in detail in the preamble.

Finally, FRA proposes other miscellaneous amendments to part 225 and the Guide, including revisions not solely related to railroad occupational casualties, such as the telephonic reporting of a train accident that fouls a main line track used for scheduled passenger service.

II. Proceedings to Date and Summary of Issues Addressed by the Working Group

FRA has developed this proposal through its Railroad Safety Advisory Committee (RSAC). RSAC was formed by FRA in March of 1996 to provide a forum for consensual rulemaking and program development. The Committee had representation from all of the agency's major interest groups, including railroad carriers, labor organizations, suppliers, manufacturers, and other interested parties. FRA typically proposes to assign a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of the RSAC, the proposal is formally recommended to FRA. If a working group is unable to reach consensus on recommendations for action, FRA will move ahead to resolve the issue through traditional rulemaking proceedings.

On April 23, 2001, FRA presented task statement 2001–1, regarding accident/incident reporting conformity, to the full RSAC. When FRA presented the subject of revising its accident reporting regulations and Guide to RSAC, the agency stated that the purpose of the task was to bring FRA's regulations and Guide into conformity with OSHA's Final Rule, and to make certain other technical amendments. The task was accepted, and a working group was established to complete the task.

Members of the Working Group, in addition to FRA, include representatives of the following 26 entities: the American Public Transportation Association (APTA); the National Railroad Passenger Corporation (Amtrak); the Association of American Railroads (AAR); The American Short Line and Regional Railroad Association (ASLRRA); the Brotherhood of Locomotive Engineers (BLE); the Brotherhood of Railroad Signalmen (BRS); Transportation Communications International Union/Brotherhood Railway Carmen (TCIU/BRC); Canadian National Railway Company (CN) and Illinois Central Railroad Company (IC); the Sheet Metal Workers International Association; the Brotherhood of Maintenance of Way Employees (BMWE); The Burlington Northern and Santa Fe Railway Company (BNSF); Canadian Pacific Railway Company (CP); Consolidated Rail Corporation—Shared Assets (CR); CSX Transportation, Inc. (CSX); Norfolk Southern Railway Company (NS); Union Pacific Railroad Company (UP); The Long Island Rail Road (LIRR); Maryland Transit Administration (MARC); Southern California Regional Rail Authority (Metrolink); Virginia Railway Express (VRE); Trinity Rail (TR); North Carolina Department of Transportation (NCDOT); Northeast Illinois Regional Commuter Rail Corp. (Metra); the United Transportation Union (UTU); and Wisconsin Central Ltd. (WC).

The Working Group held a total of eight meetings related to this task statement. The first Working Group meeting occurred on May 21–23, 2001, in Washington, DC. A second meeting was held on July 1–3, 2001, in Washington, DC. A third meeting was held on August 7–8, 2001, in Denver, CO. A fourth meeting was held briefly on September 11, 2001, in Chicago, IL, but was cancelled due to the extraordinary events that occurred on that day. A fifth meeting was held on November 14–15, 2001, in St. Louis, MO. A sixth meeting was held on January 22–24, 2002, in Baltimore, MD. A seventh meeting was held on March 12–13, 2002, in New Orleans, LA. An eighth meeting was held on April 24–25, 2002, in Washington, DC.

As a result of these meetings, the Working Group developed consensus recommendations to propose to change the FRA regulations and Guide with respect to all issues presented except for one. Consensus could not be reached on whether railroads should be required to report deaths and injuries of the employees of railroad contractors who are killed or injured while off railroad property. Currently, FRA interprets part 225 as not requiring the reporting of such cases. Since the end of the last Working Group session, FRA has developed a compromise position and proposes that railroads not be required to report deaths or injuries to persons who are not railroad employees that occur while off railroad property unless they result from a train accident, a train incident, a highway-rail grade crossing accident/incident, or a release of a hazardous material or other dangerous commodity related to the railroad's rail transportation business. To accomplish this result, FRA proposes a three-tier definition of the term ''event or exposure arising from the operation of a railroad.'' *See* proposed § 225.5.

This NPRM is intended to reflect a Working Group consensus on all other issues, which are summarized in the following section of the preamble. With regard to part 225, the Working Group recommended amending § 225.5, which contains definitions; § 225.9, which pertains to telephonic reporting of certain accidents/incidents; and § 225.19(d), which pertains to reporting deaths, injuries, and occupational illnesses. To make certain other miscellaneous conforming changes, the Working Group recommended amending § 225.21, which pertains to forms; § 225.23(a), which pertains to joint operations; § 225.33, which pertains to internal control plans; and § 225.35, which pertains to access to records and reports. To address occupational illnesses and injuries that are privacy concern cases, claimed occupational illnesses, and other issues, the Working Group also recommended amending § 225.25, pertaining to recordkeeping. Finally, the Working Group recommended adding a new § 225.39, pertaining to FRA's policy on how FRA will maintain and make available to OSHA certain data FRA receives pertaining to cases that meet the criteria as recordable injuries or illnesses under OSHA's regulations and that are reportable to FRA, but that would not count towards the data in totals compiled for FRA's periodic reports on injuries and illnesses.

With regard to the Guide, the Working Group proposed to revise Chapter 1, pertaining to an overview of accident/incident reporting and recordkeeping requirements; Chapter 2, containing definitions; Chapter 4, pertaining to Form FRA F 6180.98, ''Railroad Employee Injury and/or Illness Record'; Chapter 6, pertaining to Form FRA F 6180.55a, ''Railroad Injury and Illness Summary (Continuation Sheet)'; and Chapter 7, pertaining to Form FRA F 6180.54, ''Rail Equipment Accident/Incident Report'; and to create a new Chapter 12, pertaining to reporting by commuter railroads, and a new Chapter 13, pertaining to new Form FRA F 6180.107, ''Alternative Record for Illnesses Claimed to Be Work-Related.'' The Working Group also proposed to change various codes used in making accident/incident reports to FRA. These codes are listed in appendices of the Guide. The Working Group supported revising Appendix C, ''Train Accident Cause Codes'; Appendix E, ''Injury and Illness Codes,'' including revising codes related to the nature of the injury or illness, and the location of the injury; and Appendix F, ''Circumstance Codes.'' The latter included revising codes related to the physical act the person was doing when hurt; where the person was located when injured; what, if any, type of on-track equipment was involved when the person was injured or became ill; what event was involved that caused the person to be injured or become ill; what tools, machinery, appliances, structures, or surfaces were involved when the person was injured or became ill; and the probable reason for the injury or illness. Further, the Working Group advocated revising Appendix H, pertaining to accident/incident reporting forms, particularly Form FRA F 6180.78, ''Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor [and] Employee Statement Supplementing Railroad Accident Report,'' and Form FRA F 6180.81, ''Employee Human Factor Attachment.'' Finally, the Working Group recommended making additional conforming changes to the Guide.

With regard to part 219, FRA decided that two terms used in that part, ''reportable injury'' and ''accident or incident reportable under Part 225 of this chapter,'' should be given a slightly different meaning. In particular, the terms would be defined for purposes of part 219 as excluding accidents or incidents that are classified as ''covered data'' under proposed § 225.5 (*i.e.*, accidents or incidents that are reportable solely because a physician or other licensed health care professional recommended in writing that a railroad employee take one or more days away from work, that the employee's work activity be restricted for one or more days, or that the employee take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the medication was taken). In part 240, the term ''accidents or incidents reportable under part 225'' is used in § 240.117(e)(2). Instead of creating a separate definition of the term for purposes of part 240, an explicit exception for covered data would be added to § 240.117(e)(2) itself.

Each of these issues is described in greater detail in the next sections of the preamble. The full RSAC has accepted the recommendations of the Working Group as to the changes to be proposed for part 225 and the Guide on which consensus was reached. With regard to the one issue on which consensus was not reached, and with regard to the minor proposed revisions to parts 219 and 240, not presented to the Working Group, the full RSAC has accepted FRA staff recommendations. In turn, FRA's Administrator has adopted these recommendations, which are embodied in this NPRM.

III. Issues Addressed by the Working Group

A. Applicability of Part 225-§ 225.3

OSHA's Final Rule states, ''(1) If your company had ten (10) or fewer employees at all times during the last calendar year, you do not need to keep OSHA injury and illness records unless OSHA or the BLS informs you in writing that you must keep records under § 1904.41 or § 1904.42.'' 29 CFR 1904.1(a). FRA's accident reporting regulations do not have such an exemption from the central reporting requirements for railroads with ten or fewer employees at all times during the last calendar year. Rather, the extent and exercise of FRA's delegated statutory safety jurisdiction are addressed fully in 49 CFR part 209, Appendix A, and the applicability of part 225 in particular is addressed in § 225.3. Under § 225.3(a), the central provisions of part 225 apply to:

> all railroads except—
>
> (1) A railroad that operates freight trains only on track inside an installation which is not part of the general railroad system of transportation or that owns no track except for track that is inside an installation that is not part of the general railroad system of transportation and used for freight operations.
>
> (2) Rail mass transit operations in an urban area that are not connected with the general railroad system of transportation.

(3) A railroad that exclusively hauls passengers inside an installation that is insular or that owns no track except for track used exclusively for the hauling of passengers inside an installation that is insular. An operation is not considered insular if one or more of the following exists on its line:

(i) A public highway-rail grade crossing that is in use;

(ii) An at-grade rail crossing that is in use;

(iii) A bridge over a public road or waters used for commercial navigation; or

(iv) A common corridor with a railroad, *i.e.*, its operations are within 30 feet of those of any railroad.

Section 20901 of title 49, U.S. Code (superseding 45 U.S.C. 38 and re-codifying provisions formerly contained in the Accident Reports Act, 36 Stat. 350 (1910), as amended), requires each railroad to file a monthly report of railroad accidents. *See* Pub. L. 103–272. Accordingly, FRA intends to apply its accident reporting regulations to all railroads under FRA's jurisdiction, unless the entity meets one of the exceptions noted in § 225.3. FRA intends to address the difference as to which entities are covered by the reporting requirements, in an MOU between FRA and OSHA.

B. Proposed Revisions and Additions to Definitions in the Regulatory Text—§ 225.5

FRA proposes to amend and add certain definitions to conform to OSHA's Final Rule or to achieve other objectives. Specifically, FRA proposes to revise the definitions of ''accident/incident,'' ''accountable injury or illness,'' ''day away from work,'' ''day of restricted work activity,'' ''medical treatment,'' and ''occupational illness.'' As previously mentioned, FRA proposes to remove the term ''arising from the operation of a railroad'' and its definition and add the term ''event or exposure arising from the operation of a railroad'' and its definition. FRA proposes to create definitions of ''covered data,'' ''general reportability criteria,'' ''medical removal,'' ''musculoskeletal disorder,'' ''needlestick or sharps injury,'' ''new case,'' ''occupational hearing loss,'' ''occupational tuberculosis,'' ''privacy concern case,'' ''significant change in the number of reportable days away from work,'' ''significant illness,'' and ''significant injury.'' Some of these changes are discussed in context later in the section-by-section analysis or elsewhere in the preamble.

C. Proposed Revisions to Provision on Telephonic Reporting—§ 225.9

The Working Group agreed to propose certain amendments to § 225.9, pertaining to telephonic reporting, and the corresponding instructions related to telephonic reporting in the Guide. Currently, FRA requires immediate telephonic reporting of accidents/incidents to FRA through the National Response Center (NRC) in only a limited set of circumstances, *i.e.*, the occurrence of an accident/incident arising from the operation of a railroad that results in the death of a rail passenger or employee or the death or injury of five or more persons. *See* § 225.9(a). Contrarily, under OSHA's Final Rule,

> Within eight (8) hours after the death of any employee from a work-related incident or the *in-patient hospitalization* of *three or more employees* as a result of a work-related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident.

Emphasis added. 29 CFR 1904.39(a). Further, OSHA's Final Rule states,

> Do I have to report a fatality or hospitalization that occurs long after the incident? No, you must only report each fatality or multiple hospitalization incident that occurs *within (30) days of an incident.*

Emphasis added. 29 CFR 1904.39(b)(6). Finally, OSHA's Final Rule states,

> *Do I have to report a fatality or multiple hospitalization incident that occurs on a commercial or public transportation system? No*, you do not have to call OSHA to report a fatality or multiple hospitalization incident if it involves a commercial airplane, train, subway or bus accident. * * *

Emphasis added. 29 CFR 1904.39(b)(4). This provision would seem to exempt railroads from telephonically reporting to OSHA all but a very few railroad accidents/incidents. The extent of the exemption from OSHA's telephonic reporting requirement depends on how broadly ''commercial or public transportation system'' is interpreted.

As recommended by the Working Group, FRA proposes to broaden the set of circumstances under which a railroad would be required to report an accident/incident telephonically to the NRC, and to make certain other refinements to the rule. Specifically, FRA first proposes to add requirements for telephonic reporting when there is a death to any employee of a contractor to a railroad performing work for the railroad on property owned, leased, or maintained by the contracting railroad. Railroads are increasingly using contractors to perform work previously performed by railroad employees. Often, those workers are exposed to hazards unique to the railroad environment or that otherwise involve conditions under FRA's responsibility. Receiving these reports will assist FRA in discharging its responsibility for monitoring the safety of railroad operations.

FRA also proposes to require the telephonic reporting of certain train accidents that are relevant to the safety of railroad passenger service, including otherwise reportable collisions and derailments on lines used for scheduled passenger service and train accidents that foul such lines. These events are potentially quite significant, since they may indicate risks which affect passenger service (*e.g.*, poor track maintenance or operating practices). Further, these events often cause disruption in intercity and commuter passenger service. Major delays in commuter trains, for instance, have direct economic effects on individuals and businesses.

FRA also proposes to incorporate provisions similar to the National Transportation Safety Board's (NTSB) requirements for telephonic reporting (49 CFR part 840) into its own regulations and Guide. The key provisions of NTSB's requirements, §§ 840.3 and 840.4, read as follows:

Note: Excerpts from NTSB requirements are provided for the convenience of the reader. The official version of the requirements appears at 49 CFR 840.3 and 840.4.

§ 840.3 Notification of railroad accidents.

The operator of a railroad shall notify the Board by telephoning the National Response Center at telephone 800–424–0201 at the earliest practicable time after the occurrence of any one of the following railroad accidents:

(a) No later than 2 hours after an accident which results in:

(1) A passenger or employee fatality or serious injury to two or more crewmembers or passengers requiring admission to a hospital;

(2) The evacuation of a passenger train;

(3) Damage to a tank car or container resulting in release of hazardous materials or involving evacuation of the general public; or

(4) A fatality at a grade crossing.

(b) No later than 4 hours after an accident which does not involve any of the circumstances enumerated in paragraph (a) of this section but which results in:

(1) Damage (based on a preliminary gross estimate) of $150,000 or more for repairs, or the current replacement cost, to railroad and nonrailroad property; or

(2) Damage of $25,000 or more to a passenger train and railroad and non-railroad property.

(c) Accidents involving joint operations must be reported by the railroad that controls the track and directs the movement of trains where the accident has occurred.

(d) Where an accident for which notification is required by paragraph (a) or (b) of this section occurs in a remote area, the time limits set forth in that paragraph shall commence from the time the first railroad employee who was not at the accident site at the time of its occurrence has received notice thereof.

§ 840.4 Information to be given in notification.

The notice required by § 840.3 shall include the following information:

(a) Name and title of person reporting.

(b) Name of railroad.

(c) Location of accident (relate to nearest city).

(d) Time and date of accident.

(e) Description of accident.

(f) Casualties:

(1) Fatalities.

(2) Injuries.

(g) Property damage (estimate).

(h) Name and telephone number of person from whom additional information may be obtained.

The reason FRA proposes to incorporate requirements similar to NTSB's standards for telephonic reporting into its own regulations and Guide is that, unlike NTSB, FRA can enforce these requirements through the use of civil penalties. FRA has long relied upon reports required to be made to NTSB as a means of alerting its own personnel who are required to respond to these events. Although most railroads are quite conscientious in making telephonic reports of significant events, including some not required to be reported, from time to time FRA does experience delays in reporting that adversely affect response times. In this regard, it should be noted that FRA conducts more investigations of railroad accidents and fatalities than any other public body, and even in the case of the relatively small number of accidents that NTSB selects for major investigations, FRA provides a substantial portion of the technical team participating from the public sector. Accordingly, it is appropriate that FRA take responsibility for ensuring that timely notification is provided. As can be seen by comparing the quoted NTSB regulations to proposed § 225.9, FRA has not adopted NTSB's standards wholesale, but extracted necessary additions to FRA's existing requirements (e.g., train accident requiring evacuation of passengers), used terminology from FRA regulations to describe the triggering events (*e.g.*, ''train accident'' as defined in § 225.5), and slightly modified the contents of the required report (*e.g.*, ''available estimates'' instead of ''estimate'').

Concern was expressed within the Working Group about joint operations as to which railroad should be responsible for making the telephonic report. The Working Group agreed that for purposes of telephonic reporting, the dispatching railroad, which controls the track involved, would be responsible for making the telephonic report.

There was much discussion in the Working Group regarding whether railroads should be required to telephonically report certain incidents to the NRC ''immediately.'' One suggestion was to set a fixed period, such as three or four hours, to report an accident/incident, or in any event, be given a reasonable amount of time to report. Prompt reporting permits FRA and (where applicable) NTSB to dispatch personnel quickly, in most cases making it possible for them to arrive on scene before re-railing operations and track reconstruction begin and key personnel become unavailable for interview. Decades of experience in accident investigation have taught FRA that the best information is often available only very early in the investigation, before physical evidence is disturbed and memories cloud.

In addition, there was a suggestion that railroads be permitted to immediately report certain incidents by several methods other than by a telephone call, including use of a facsimile, or notification by e-mail. Railroad representatives indicated that telephonic reporting is sometimes burdensome, particularly when a busy manager must wait to speak to an emergency responder for extended periods of time. FRA rejected this suggestion, and is proposing to require that immediate notification be done by telephone, and only by telephone, because FRA is concerned that if notification is given by other methods, such as facsimile or e-mail, it is possible that no one will be available to immediately receive the facsimile or e-mail message. Conversely, with a telephone call to an emergency response center, a railroad should be able to speak immediately to a person, or at the very least, should hear a recording that would immediately direct the caller to a person.

Concern was expressed within the Working Group that continued use of the term ''immediate'' in conjunction with a broadening of the events subject to the FRA rule might produce harsh results, due to the need to address emergency response requirements for the safety and health of those affected and to determine the facts that are predicates for reporting. The proposed rule addresses this concern by stating that,

> [t]o the extent the necessity to report an accident/incident depends upon a determination of fact or an estimate of property damage, a report would be considered immediate if made as soon as possible following the time that the determination or estimate is made, or could reasonably have been made, whichever comes first, taking into consideration the health and safety of those affected by the accident/incident, including actions to protect the environment.

Proposed § 225.9(d). Since FRA and the Working Group believe that immediate telephonic reporting raises issues related to emergency response unique to the railroad industry, the Working Group agreed not to conform in some respects to OSHA's oral or in-person reporting requirements. Accordingly, to the extent that OSHA's requirements regarding oral reports by telephone or in person apply to the railroad industry and that part 225 diverges from those requirements, FRA intends to include in the MOU with OSHA a provision specifying how and why FRA intends to depart from OSHA's requirements in this area.

D. Proposed Revisions to Criteria for Reporting Occupational Fatalities, Injuries, and Illnesses—§ 225.19(d)

1. FRA's Current and Proposed Reporting Criteria Applicable to Railroad Employees

Currently, § 225.19(d) reads as follows:

> Group III-Death, injury, or occupational illness. Each event arising from the operation of a railroad shall be reported on Form FRA F 6180.55a if it results in:
>
> (1) Death to any person;
>
> (2) Injury to any person that requires medical treatment;
>
> (3) Injury to a railroad employee that results in:
>
> (i) A day away from work;
>
> (ii) Restricted work activity or job transfer; or
>
> (iii) Loss of consciousness; or
>
> (4) Occupational illness of a railroad employee.
>
> * * * * *

The comparable provisions of OSHA's Final Rule are at §§ 1904.4(a) and 1904.7(b), which read as follows:

§ 1904.4 Recording criteria.

(a) Basic requirement. Each employer required by this Part to keep records of fatalities, injuries, and illnesses must

record each fatality, injury and illness that:

(1) Is work-related; and

(2) Is a new case; and

(3) Meets one or more of the general recording criteria of § 1904.7 or the application to specific cases of § 1904.8 through § 1904.12.

* * * * *

§ 1904.7 General recording criteria.

* * * * *

(b) Implementation. (1) How do I decide if a case meets one or more of the general recording criteria? A work-related injury or illness must be recorded if it results in one or more of the following:

(i) Death. See § 1904.7(b)(2).

(ii) Days away from work. See § 1904.7(b)(3).

(iii) Restricted work or transfer to another job. See § 1904.7(b)(4).

(iv) Medical treatment beyond first aid. See § 1904.7(b)(5).

(v) Loss of consciousness. See § 1904.7(b)(6).

(vi) A significant injury or illness diagnosed by a physician or other licensed health care professional. See § 1904.7(b)(7).

As indicated by the preceding rule text, OSHA's Final Rule has specific recording criteria for cases described in 29 CFR 1904.8 through 1904.12. These cases involve work-related needlestick and sharps injuries, medical removal, occupational hearing loss, work-related tuberculosis, and independently reportable work-related musculoskeletal disorders. See Web site for OSHA regulations located in the **ADDRESSES** section.

In response to several comments received after publication of the Final Rule, which was scheduled to take effect on January 1, 2002, OSHA delayed the effective date of three of the rule's provisions until January 1, 2003, so as to allow itself further time to evaluate § 1904.10, regarding occupational hearing loss, and §§ 1904.12 and 1904.29(b)(7)(vi),[1] regarding musculoskeletal disorders. *See* 66 FR 52031. On July 1, 2002, OSHA published a final rule establishing a new standard for the recording of occupational hearing loss cases for calendar year 2003. *See* 67 FR 44037. However, because OSHA was still uncertain about how to craft an appropriate definition for musculoskeletal disorders and whether or not it was necessary to include a separate column on the OSHA log for the recording of these cases and occupational hearing loss cases, OSHA simultaneously published a proposed delay of the effective dates of these provisions, from January 1, 2003, to January 1, 2004, and requested comment on the provisions. *See* 67 FR 44124.

Prior to OSHA's Final Rule, the recordkeeping rule had no specific threshold for recording hearing loss cases. See 67 FR 44038. The Final Rule established a new 10–dB standard at 29 CFR 1904.10:

> If an employee's hearing test (audiogram) reveals that a Standard Threshold Shift (STS) has occurred, you must record the case on the OSHA 300 Log by checking the ''hearing loss'' column. . . . A standard Threshold Shift, or STS, is defined in the occupational noise exposure standard at 29 CFR 1910.95(c)(10)(i) as a change in hearing threshold, relative to the most recent audiogram for that employee, of an average of 10 decibels (dB) or more at 2000, 3000, and 4000 hertz in one or both ears.

See 66 FR 6129 (January 19, 2001). On October 12, 2001, OSHA delayed the provision and instead adopted the standard set forth in OSHA's enforcement policy, which had been in effect since 1991, and which is FRA's current approach,[2] in order to seek comments on what should be the appropriate hearing loss threshold. *See* 66 FR 52031. The enforcement policy stated that OSHA would cite employers for failing to record work-related shifts in hearing of an average of 25 dB or more at 2000, 3000, and 4000 Hz in either ear. Thus, the hearing loss of an employee would be tested by measuring the difference, or shift, between the employee's current audiogram and the employee's original baseline audiogram. *See* 67 FR 44037, 44038. If the shift was 25 dB or more, OSHA required that it be recorded. The employee's original baseline audiogram is one of two starting points, or baselines, from which you can measure a Standard Threshold Shift (STS), the other being audiometric zero.

Audiometric zero represents the statistical average hearing threshold level of young adults with no history of aural pathology, thus it is not specific to the employee. This is the starting point from which the American Medical Association (AMA) measures a 25–dB permanent hearing impairment. The employee's original baseline audiogram, on the other hand, is taken at the time the worker was first placed in a hearing conservation program.[3] This starting point, which has been enforced by OSHA since 1991 and is the starting point currently used by FRA, fails to take into account any hearing loss that the employee has suffered in previous jobs and can present a problem if the employee has had several successive employers at high-noise jobs.

Thus, if an individual employee has experienced some hearing loss before being hired, a 25–dB shift from the employee's original baseline will be a larger hearing loss than the 25–dB shift from audiometric zero that the AMA recognizes as a hearing impairment and disabling condition. For example, if an employee experienced a 20–dB shift from audiometric zero prior to being hired in a job where he later suffered a 15–dB shift hearing loss from his original baseline audiogram, the AMA would count this as a 35–dB shift, a serious hearing impairment, but under OSHA's enforcement policy (and FRA's current approach), this would only have counted as a 15–dB shift that is not recordable under OSHA's enforcement policy or § 1904.10 for calendar year 2002. In order for it to become recordable, the employee would have had to suffer an additional 10–dB shift, which would mean that the employee would have suffered a 45–dB shift from audiometric zero—almost twice the amount that the AMA considers to be a permanent hearing impairment.

After considering several comments demonstrating that a 25–dB shift from an employee's original baseline audiogram was not protective enough and that a 10–dB shift from an employee's original baseline audiogram was overly protective (and more appropriate as an early warning mechanism that should trigger actions under the Occupational Noise Exposure Standard [4] to prevent impairment from

[1] The effective date of the second sentence of § 1904.29(b)(7)(vi), which states that musculoskeletal disorders are not considered privacy concern cases, was delayed until January 1, 2003 in OSHA's October 12, 2001, final rule. On July 1, 2002, OSHA proposed to delay the effective date of this same provision until January 1, 2004. *See* 67 FR 44124. This provision will be discussed in the context of privacy concern cases in the section-by-section analysis at ''III.G.1.'' of the preamble.

[2] *See* current *Guide* at Appendix E, p. 4. FRA's Occupational Illness Code #1151, concerning noise induced hearing loss, provides in part: ''An STS is a change in hearing threshold relative to a baseline audiogram that averages 10 dB or more at 2000, 3000, and 4000 hertz in either ear. Documentation of a 10 dB shift is not, of and by itself, reportable. There must be a determination by a physician . . . that environmental factors at work were a significant cause of the STS. However, if an employee has an overall shift of 25 dB or more above the original baseline audiogram, then an evaluation must be made to determine to what extent it resulted from exposure at work.''

[3] Not all employees are placed in a hearing conservation program. OSHA only requires such a program to be in place in general industry when the noise exposure exceeds an 8-hour time-weighted average of 85 dB.

[4] Under § 1910.95, employers must take protective measures (employee notification, providing hearing protectors or refitting of hearing protectors, referring employee for audiological evaluation where appropriate, etc.) to prevent further hearing loss for employees who have experienced a 10–dB shift from the employee's original baseline audiogram. *See* 67 FR at 44040–41.

occurring), OSHA adopted a compromise position that makes a 10–dB shift from an employee's original baseline audiogram recordable in those cases where this shift also represents a 25–dB shift from audiometric zero.

As OSHA's new approach to defining and recording occupational hearing loss cases was not presented to the Working Group, FRA seeks comment on whether FRA should adopt OSHA's new approach as FRA's fixed approach, beginning on the effective date of FRA's final rule, or whether FRA should diverge from OSHA and continue to enforce OSHA's current approach (which was approved by the Working Group and the RSAC and is the same as FRA's current approach) as a fixed approach beginning on the effective date of FRA's final rule. *See* proposed *Guide* at Ch. 6, pp. 27–28, and Appendix E, p. 4. If OSHA's current approach is permitted to continue in effect as FRA's approach, this divergence would need to be addressed in the MOU and approved by OSHA so as to avoid dual reporting on this issue. If OSHA's new approach for calendar year 2003 is adopted, the proposed *Guide* would be updated to reflect the new approach.

As noted above, OSHA may be reconsidering for calendar year 2003 the definition of musculoskeletal disorder (MSD) and the requirement of having a separate column on the OSHA 300 log for the recording of MSD and occupational hearing loss cases. As the issue of OSHA's proposed delays was not before the Working Group when consensus was reached, FRA seeks comment on whether or not the definition and column requirements should be adopted if OSHA's proposed January 1, 2004 delay takes effect. If FRA goes forth with the provisions as approved by the Working Group, FRA would be adopting these provisions in advance of OSHA, a result that may not have been contemplated by the Working Group when it agreed to follow OSHA on these issues prior to the issuance of the proposed delays.

Even if OSHA chooses not to delay the effective date of these provisions, FRA seeks comment on whether or not we should diverge from OSHA by not adopting the definition or column requirements, since FRA already has its own forms and methods in place to collect this data for OSHA's purposes. Instead of requiring railroads to record cases and check boxes on the OSHA 300 log, FRA requires railroads to report these cases using assigned injury codes on the FRA Form F 6180.55a. Code 1151, for example, is the code for occupational hearing loss cases, thus no additional column would be necessary. Similarly, the different kinds of injuries that could qualify as an MSD are given separate codes. Once OSHA decides what types of injuries are appropriate to include in the category or definition of an MSD, OSHA would be able to identify the MSD cases by their respective code numbers, thereby allowing OSHA to use FRA's data for national statistical purposes. Although it is not practical for FRA's injury codes to be as extensive as OSHA's codes, it would be possible to amend the Guide so as to reflect the major codes recognized by OSHA and to add a category such as ''Other MSDs, as defined by OSHA in § 1904.12.''

FRA also seeks comment on whether or not a definition of an MSD is necessary, since currently there are no special criteria beyond the general recording criteria for determining which MSDs to record, and because OSHA's definition appears to be used primarily as guidance for when to check the MSD column on the 300 Log. *See* 66 FR 6129–6130. If the definition of an MSD and the column requirements were to be omitted from the Final Rule, these differences would be discussed in the MOU.

FRA also seeks comment on whether its regulations should ''float,'' *i.e.*, change automatically anytime OSHA revises its regulations, since the main purpose of this rulemaking is to bring FRA's rule into general conformity with OSHA's regulations (which are developed after a full opportunity for notice and comment) or whether FRA's adoption of a fixed and certain approach can better serve FRA's safety objectives and the needs of the regulated community. This issue is particularly relevant for the proposed definition of medical removal. Because medical removal is such a complex issue, and one that is rarely, if at all, encountered in the railroad environment, FRA seeks comment on whether this definition should ''float'' with OSHA's. That is, should we word our definition so that it is tied to OSHA's standard anytime OSHA might change that standard? Since the proposed definition [5] references OSHA's standard without restating it within the rule text or preamble, this would reflect the intent of the Working Group.

Finally, OSHA added another category of reportable cases: ''significant injuries or illnesses.'' With regard to the reportability of illnesses and injuries of railroad employees, there are at least three primary differences between OSHA's reporting criteria and FRA's current reporting criteria, at least as stated in § 225.19(d). First, FRA requires that all occupational illnesses of railroad employees be reported. *See* §§ 225.5 and 225.19(d)(4). Contrarily, under OSHA's Final Rule, only certain occupational illnesses are to be reported, namely those that result in death, medical treatment, days away from work, or restricted work or job transfer; constitute a ''significant illness'; or meet the ''application to specific cases of [29 CFR] §§ 1904.8 through 1904.12.'' Second, for the reason that FRA's interpretation of part 225 is presently very inclusive, it does not use the term ''significant injuries,'' which is incorporated in the OSHA Final Rule. While FRA does not use the phrase ''significant injuries'' in the current rule text, the current Guide does require the reporting of conditions similar to OSHA's ''significant injuries.''

> The distinction between medical treatment and first aid depends not only on the treatment provided, but also on the severity of the injury being treated. First aid * * * [i]nvolves treatment of only *minor* injuries. * * * An injury is not minor if * * * [i]t impairs bodily function (*i.e.*, normal use of senses, limbs, etc.); * * * [or] [i]t results in damage to the physical structure of a nonsuperficial nature (*e.g.* fractures); * * *.

Guide, Ch. 6, p. 6. Accordingly, under the Guide, fractures are considered not to be minor injuries, and a punctured eardrum would likewise not be considered a minor injury because it would involve impairment of ''normal use of senses.'' *Id.* Third, FRA does not have ''specific cases'' reporting criteria for occupational injuries of railroad employees.

FRA proposes to conform part 225 to OSHA's Final Rule with regard to these three differences by amending its regulations at § 225.19(d) and related definitions at § 225.5. FRA would, however, distribute the specific conditions specified under OSHA's ''significant'' category (§ 1904.7(b)(7)) into injuries and illnesses, subcategories that OSHA could, of course, aggregate, and FRA would omit the note to OSHA's description of ''significant illnesses and injuries,'' which does not appear to be necessary for a proper understanding of the concept and which might be read as open-ended, a result

[5] The proposed definition currently reads: ''*Medical removal* means medical removal under the medical surveillance requirements of an Occupational Safety and Health Administration standard in 29 CFR part 1910, even if the case does not meet one of the general reporting criteria.''

FRA does not intend. The text of the note is excerpted below:

Note to § 1904.7: OSHA believes that most significant injuries and illnesses will result in one of the criteria listed in § 1904.7(a). * * * In addition, there are some significant progressive diseases, such as byssinosis, silicosis, and some types of cancer, for which medical treatment or work restrictions may not be recommended at the time of the diagnosis but are likely to be recommended as the disease progresses. OSHA believes that cancer, chronic irreversible diseases, fractured or cracked bones, and punctured eardrums are generally considered significant injuries and illnesses, and must be recorded at the initial diagnosis even if medical treatment or work restrictions are not recommended, or are postponed, in a particular case.

29 CFR 1904.7(b)(7). FRA believes that the note is intended to reference a statutory issue not present in the case of FRA's reporting system and can be omitted from FRA's rule as not relevant and to avoid potential ambiguity. FRA also proposes to explain these new reporting requirements in the Guide. (See later discussion of proposed Chapter 6 of the Guide.)

2. FRA's Current and Proposed Reporting Criteria Applicable to Employees of a Contractor to a Railroad

As previously noted, under § 225.19(d), ''Each event arising from the operation of a railroad shall be reported * * * if it results in * * * (1) Death to any person; (2) Injury to any person that requires medical treatment. * * *'' Under the ''definitions'' section of the accident reporting regulations, ''person'' includes an independent contractor to a railroad. *See* § 225.5. Reading these regulatory provisions together, deaths to employees of railroad contractors that arise from the operation of a railroad, and injuries to employees of railroad contractors that arise from the operation of a railroad and require medical treatment would appear to be reportable to FRA. (The Guide, however, narrows the requirement through its reading of ''arising from the operation of a railroad.'') FRA does not require reporting of occupational illnesses of contractors; under § 225.19(d)(4), only the occupational illnesses of railroad employees must be reported.

Contrarily, under OSHA's Final Rule, the reporting entity is required to report work-related injuries and illnesses, including those events or exposures meeting the special recording criteria for employees of contractors, only if they are under the day-to-day supervision of the reporting entity.

If an employee in my establishment is a contractor's employee, must I record an injury or illness occurring to that employee? If the contractor's employee is under the day-to-day supervision of the contractor, the contractor is responsible for recording the injury or illness. If you supervise the contractor employee's work on a day-to-day basis, you must record the injury or illness.

29 CFR 1904.31(b)(3).

In the Working Group meetings, APTA noted that it is difficult to comply with FRA's current rule, read literally, with respect to an employee of a contractor to a railroad while off railroad property. Many commuter railroads often do not know whether an employee of a contractor to the railroad is injured or sickened if the event occurred on property other than property owned, leased, or maintained by the commuter railroad; it is difficult to follow up on an injury or illness suffered by such an employee. For example, ABC Railroad contracts with XYZ Contractor to repair ABC's railcars at XYZ's facilities. An employee of XYZ Contractor, while repairing ABC's rail car at XYZ's facility, receives an injury resulting in medical treatment. ABC Railroad notes that it may not know about the injury and, therefore, could not report it. Furthermore, no information is lost in the national database since the contractor must report the injury to OSHA even if ABC Railroad does not report the injury. The Working Group could not reach consensus on whether to require reporting of injuries to employees of railroad contractors while off railroad property.

A similar difficulty with reporting occurs in the context of fatalities to employees of contractors to a railroad. With respect to whether to require that railroads report fatalities of employees of contractors that arise out of the operation of the railroad but occur off railroad property, the Working Group also could not reach consensus. AAR noted that for the reasons stated above related to injuries and illnesses, it is difficult for railroads to track fatalities of persons who are not employed by the railroad. Labor noted on the other hand, that fatalities are the most serious cases on the spectrum of reportable incidents and that it would be important that those cases be reported to FRA. In addition, labor representatives noted that railroads often contract for taxi services to deadhead railroad crews to their final release point and that if a driver died in a car accident transporting a railroad crew, FRA should know about those cases. FRA noted that as a practical matter, those types of cases occurred infrequently, that FRA data showed only two possible fatal car accidents occurring off railroad property that involved employees of contractors to a railroad. As a compromise, labor representatives proposed that only fatalities that involved transporting or deadheading railroad crews be reportable, but that all other fatalities to employees of contractors to a railroad that occur off railroad property, not be reportable, even if the incident arose out of the operation of the railroad.

Since the Working Group could not reach consensus on the issue of reporting injuries, illnesses, or fatalities of contractors to a railroad that arose out of the operation of the railroad but occurred off railroad property, FRA makes the following proposal based upon its reasoned consideration of the issue. In this regard, FRA has attempted to balance its need for comprehensive safety data concerning the railroad industry against the practical limitations of expecting railroads to be aware of all injuries suffered by contractors off of railroad property. FRA recognizes that certain types of accident/incidents occurring off of railroad property involve scenarios in which the fact that the contractor was performing work for a railroad is incidental to the accident or incident, and would offer no meaningful safety data to FRA, *e.g.*, ordinary highway accidents involving an on-duty contractor to a railroad.

The existing term ''arising from the operation of a railroad'' and its definition would be deleted from § 225.5. Currently, the definition reads as follows: ''*Arising from the operation of a railroad* includes all activities of a railroad that are related to the performance of its rail transportation business.'' The new term ''event or exposure arising from the operation of a railroad'' would be added to § 225.5's list of defined terms and given a three-tier definition. First, ''event or exposure arising from the operation of a railroad'' would be defined broadly with respect to any person on property owned, leased, or maintained by the railroad, to include any activity of the railroad that relates to its rail transportation business and any exposure related to that activity. Second, the term would be defined broadly in the same way with respect to an employee of the railroad, but without regard for whether the employee is on or off railroad property. Third, the term would be defined narrowly with respect to a person who is neither on the railroad's property nor an employee of the railroad, to include only certain enumerated events or exposures, *i.e.*, a train accident, a train incident, or a highway-rail crossing accident/incident involving the railroad; or a release of hazardous material from

a railcar in the railroad's possession or a release of another dangerous commodity if the release is related to the railroad's rail transportation business.

When read together with the rest of proposed § 225.19(d), the new definition of ''event or exposure arising from the operation of a railroad'' would mean that a railroad would not have to report to FRA the death or injury to an employee of a contractor to the railroad who is off railroad property (or deaths or injuries to any person who is not a railroad employee) unless the death or injury results from a train accident, train incident, or highway-rail grade crossing accident involving the railroad; or from a release of a hazardous material or some other dangerous commodity in the course of the railroad's rail transportation business. In addition, FRA would require railroads to report work-related illnesses only of railroad employees and under no circumstances the illness of employees of a railroad contractor. These proposed reporting requirements diverge from the OSHA standard, which would require the reporting of the work-related death, injury, or illness of an employee of a contractor to the reporting entity if the contractor employee is under the day-to-day supervision of the reporting entity. 29 CFR 1904.31(b)(3). If FRA adopts this proposal, FRA's divergence from OSHA would be addressed in the MOU.

3. Reporting Criteria Applicable to Illnesses

At a Working Group meeting, AAR proposed that major member railroads would file, with their FRA annual report, a list of claimed but denied occupational illnesses not included on the Form FRA F 6180.56, ''Annual Railroad Report of Employee Hours and Casualties by State,'' because the railroads found the illnesses not to be work-related. The list would be organized by State, and would include the name of the reporting contact person. *See also* the discussion of recording claimed illnesses, discussed later in the preamble under section ''III.G.2.,'' below. FRA and other Working Group members have expressed appreciation for this undertaking. It was agreed that this is appropriate for implementation on a voluntary basis, and no comment is sought on this matter.

E. Proposed Technical Revision to § 225.21, ''Forms''

The Working Group agreed to add a new subsection § 225.21(j) to create a new form (Form FRA F 6180.107), which would be labeled ''Alternative Record for Illnesses Claimed to Be Work-Related.'' This form would call for the same information that is included on the Form FRA F 6180.98 and would have to be completed to the extent that the information is reasonably available. A further discussion of the nature of this new form is discussed under the revisions to § 225.25, later in this preamble.

F. Proposed Technical Revision to § 225.23, ''Joint Operations''

The Working Group agreed to propose certain minor changes to the regulatory text; specifically, to § 225.23(a), concerning joint operations, simply to bring it into conformity with the other major changes to the regulatory text that are proposed. Note that for purposes of telephonic reporting in joint operations, the dispatching railroad would be required to make the telephonic report. *See* proposed § 225.9.

G. Proposed Revisions to § 225.25, ''Recordkeeping''

1. Privacy Concern Cases

The Working Group agreed to propose changes to the regulatory text under § 225.25, concerning recordkeeping, by revising § 225.25(h) to address a class of cases described by OSHA as ''privacy concern cases.'' OSHA requires an employer to give its employees and their representatives access to injury and illness records required by OSHA, such as the OSHA 300 Log, with some limitations that apply to privacy concern cases. 29 CFR 1904.35(b)(2), 1904.29(b). A ''privacy concern case'' is defined by OSHA in 29 CFR 1904.29(b)(7); one type of a privacy concern case is, *e.g.*, an injury or illness to an intimate body part. FRA would define the term similarly in proposed § 225.5. In privacy concern cases, OSHA prohibits recording the name of the injured or ill employee on the Log. The words ''privacy case'' must be entered in lieu of the employee's name. The employer must ''keep a separate, confidential list of the case numbers and employee names for your privacy concern cases so you can update the cases and provide the information to the government if asked to do so.'' 29 CFR 1904.29(b)(6). In addition, if the employer has a reasonable basis to believe that the information describing the privacy concern case may be personally identifiable even though the employee's name has been left out, the employer may use discretion in describing the injury or illness. The employer must, however, enter enough information to identify the cause of the incident and the general severity of the injury or illness, but need not include details, *e.g.*, a sexual assault case may be described as an injury from assault.

By contrast, FRA requires that an employee have access to information in the FRA-required Railroad Employee Injury and/or Illness Record (Form FRA F 6180.98) regarding his or her own injury or illness, not the FRA-required records regarding injuries or illnesses of other employees. § 225.25(a), (b), (c). This renders the FRA-required log of reportables and accountables with its information on the name and Social Security number of the employee, inaccessible to other employees or anyone else. *Id.* Additionally, FRA proposes to amend the requirement that the record contain an employee's Social Security Number, opting to allow a railroad to enter an employee's identification number instead. *See* proposed § 225.25(b)(6). Therefore, FRA considers this difference a sufficient reason not to adopt OSHA's privacy requirements with regard to the reportable and accountable log. This proposed variation from OSHA will be discussed in the MOU.

Although FRA does not allow wide access to the reportable and accountable log, FRA does require, however, the posting in a conspicuous place in each of the employer's establishments, certain limited information on reportable accidents/incidents that occurred at the establishment, thereby making this information accessible to all those working at the establishment and not simply the particular employee who suffered the injury or illness. § 225.25(h). That limited information includes the incident number used to report the case, the date of the injury or illness, the regular job title of the employee involved, and a description of the injury or condition. Even though the name of the employee is not required to be listed, the identity of the person might in some cases be determined, particularly at small establishments. Currently, under § 225.25(h)(15), FRA permits the railroad not to post an injury or illness at the establishment where it occurred if the ill or injured employee requests in writing to the railroad's reporting officer that the injury or illness not be posted. The preceding revision of the rule would be consistent with OSHA's requirements with regard to its Log, but more expansive than those requirements. FRA would also give railroads discretion not to provide details of the injury or condition that constitutes a privacy case. FRA will discuss these slight variations from OSHA's privacy requirements in the MOU.

Another issue relevant to reporting privacy concern cases arose in § 1904.29(b)(7)(vi) of OSHA's January 19, 2001, Final Rule, which states that musculoskeletal disorders (MSDs) are not considered privacy concern cases. OSHA delayed the effective date of this exclusion until January 1, 2003, in its October 12, 2001, final rule. On July 1, 2002, OSHA proposed to delay the effective date of this same provision until January 1, 2004. *See* 67 FR 44124. As the issue of OSHA's proposed delay of this provision was not before the Working Group when consensus was reached, FRA seeks comment on whether or not this exclusion should be adopted if OSHA's proposed January 1, 2004, delay takes effect. If FRA goes forth with the provision as approved by the Working Group, FRA would be adopting the exclusion in advance of OSHA's adoption of it and in advance of OSHA's defining the very term that is supposed to be excluded, a result that may not have been contemplated by the Working Group when it agreed to the proposed rule text on this issue prior to OSHA's issuance of the proposed delay. *See* discussion concerning reporting criteria for MSDs at section III.D.1 of the preamble, above. Even if OSHA chooses not to delay the effective date of this provision and to give it effect on January 1, 2003, FRA seeks comment on whether or not we should diverge from OSHA by not adopting the exclusion. If FRA's final definition of privacy concern case differs from OSHA's eventual definition of the term, then the difference would be discussed in the MOU.

Finally, the question was raised in the Working Group whether FRA's proposed regulations conformed to the Health Insurance Portability and Accessibility Act of 1996 (Pub. L. 104–191 (HIPAA)) and to the Department of Health and Human Services' regulations implementing HIPAA with regard to the privacy of medical records. *See* ''the Standards for Privacy of Individually Identifiable Health Information.'' 65 FR 82462 (Dec. 28, 2000), codified at 45 CFR parts 160 and 164. Since it appears that OSHA's regulations conform to HIPAA, and FRA proposes to conform to OSHA in all essential respects with regard to the treatment of medical information, FRA believes that its proposed regulations will not conflict with HIPAA requirements.

2. Claimed Illnesses for Which Work-Relatedness Is Doubted

a. Recording claimed illnesses. Under the current FRA rule, all accountable or reportable injuries and illnesses are required to be recorded on Form FRA F 6180.98, ''Railroad Employee Injury and/or Illness Record,'' or an equivalent record containing the same information. The subset of those cases that qualify for reporting are then reported on the appropriate forms. § 225.25(a), (b). If the case is not reported, the railroad is required to state why not on Form FRA F 6180.98 or the equivalent record. § 225.25(b)(26).

Although this system has generally worked well, problems have arisen with respect to accounting of claimed occupational illnesses. As further explained below, railroads are subject to tort-based liability for illnesses and injuries that arise as a result of conditions in the workplace. By their nature, many occupational illnesses, particularly repetitive stress cases, may arise either from exposures outside the workplace, inside the workplace, or a combination of the two. Accordingly, issues of work-relatedness become very prominent. Railroads evaluate claims of this nature using medical and ergonomic experts, often relying upon job analysis studies as well as focusing on the individual claims.

With respect to accounting and reportability under part 225, railroad representatives state their concern that mere allegations (*e.g.*, receipt of a complaint in a tort suit naming a large number of plaintiffs) not give rise to a duty to report. They add that many such claims are settled for what amounts to nuisance values, often with no admission of liability on the part of the railroad, so even the payment of compensation is not clear evidence that the railroad views the claim of work-relatedness as valid.

Although sympathetic to these concerns, FRA is disappointed in the quality of data provided in the past related to occupational illnesses. Indeed, in recent years the number of such events reported to FRA has been extremely small. FRA has an obligation to verify, insofar as possible, whether the railroad's judgments rest on a reasonable basis, and discharging that responsibility requires that there be a reasonable audit trail to verify on what basis the railroad's decisions were made. While the basic elements of the audit trail are evident within the internal control plans of most railroads, this is not universally the case.

Accordingly, FRA asked the Working Group to consider establishing a separate category of claimed illnesses. This category would be comprised of (1) Illnesses for which there is insufficient information to determine whether the illness is work-related; (2) Illnesses for which the railroad has made a preliminary determination that the illness was not work-related; and (3) Illnesses for which the railroad has made a final determination that the illness is not work-related. These records would contain the same information as the Form FRA F 6180.98, but might at the railroad's election—

- Be captioned ''alleged'';
- Be retained in a separate file from other accountables; and
- If accountables are maintained electronically, be excluded from the requirement to be provided at any railroad establishment within 4 hours of a request.

This would permit the records to be kept at a central location, in either paper or electronic format.

The railroad's internal control plan would be required to specify the custodian of these records and where they could be found. For any case determined to be reportable, the designation ''alleged'' would be removed, and the record would be transferred to the reporting officer for retention and reporting in the normal manner. In the event the narrative block (Form FRA F 6180.98, block 39) indicates that the case is not reportable, the explanation contained in that block would record the reasons the railroad determined that the case was not reportable, making reference to the ''most authoritative'' information relied upon. Although the proposed Form FRA F 6180.107 or equivalent would not require a railroad to include all supporting documentation, such as medical records, it would require a railroad to note where the supporting documentation is located so that it will be readily accessible to FRA upon request.

FRA believes that the system of accounting for contested illness cases described above will focus responsibility for these decisions and provide an appropriate audit trail. In addition, it will result in a body of information that can be used in the future for research into the causes of prevalent illnesses. Particularly in the case of musculoskeletal disorders, it is entirely possible that individual cases may appear not to be work-related due to an imperfect understanding of stressors in the workplace. Review of data may suggest the need for further investigation, which may lead to practical solutions that will be implemented either under the industrial hygiene programs of the railroads or as a result of further regulatory action. Putting this information ''on the books'' is a critical step in sorting out over time what types of disorders have a nexus to the workplace. *See* proposed amendments to §§ 225.21, 225.25,

225.33, and 225.35 and proposed new Chapter 13 of the Guide.

b. FRA review of railroads' work-relatedness determinations. Concern arose within the Working Group regarding how FRA planned to review a reporting officer's determination that the illness is not work-related. As discussed in section ''III.P.3.,'' below, of the preamble, it will be the railroad's responsibility to determine whether an illness is work-related. In connection with an inspection or audit, FRA's role will be to determine whether the reporting officer's determination was reasonable. Even if FRA disagrees with the reporting officer's determination not to report, FRA will not find that a violation has been committed as long as the determination was reasonable. FRA understands that this is consistent with the approach OSHA is employing under its revised rule, and in any event it is most appropriate given the assignment of responsibility for reporting to the employing railroad. FRA plans to establish access to appropriate expert resources (medical, ergonomic, etc.) as necessary to evaluate the reasonableness of railroad decisions not to report particular cases.

3. Technical Amendments

The Working Group also agreed to propose certain minor changes to subsections 225.25(b)(16), (b)(25), (e)(8), and (e)(24), simply to bring these subsections into conformity with the other major changes to the regulatory text that are proposed.

H. Proposed Addition of § 225.39, ''FRA Policy Statement on Covered Data''

FRA proposes to add a new section to the regulatory text that would include a policy statement on covered data. Specifically, proposed § 225.39 would state that FRA will not include in its periodic summaries of data for the number of occupational injuries and illnesses, reports of a case, not otherwise reportable under part 225, involving (1) One day away from work when in fact the employee returned to work, contrary to the written recommendation to the employee by the treating physician or other licensed health care professional; (2) One day of restricted work when in fact the employee was not restricted, contrary to the written recommendation to the employee by the treating physician or other licensed health care professional; or (3) A written over-the-counter medication prescribed at prescription strength, whether or not the medication was taken.

In addition to proposing revisions to its regulations in the *Code of Federal Regulations,* FRA is proposing revisions to its Guide for Preparing Accident/Incident Reports (*Guide* or *FRA's Guide*).

Written comments on the proposed *Guide* must be received by November 8, 2002. Comments may be mailed to the address or submitted electronically to the Web site given under **ADDRESSES** at the beginning of this document. The proposed *Guide* is posted on FRA's Web site at *http://safetydata.fra.dot.gov/guide.*

I. Proposed Revisions to Chapter 1 of the Guide, ''Overview of Accident/Incident Reporting and Recordkeeping Requirements''

Proposed Chapter 1 of the Guide has been revised to reflect the major proposed changes to part 225 and the rest of the Guide, such as important proposed definitions, the proposed revision of the telephonic reporting requirement, and the proposed revision of the reportability criteria in § 225.19(d). In addition, Chapter 1 has been revised to change the closeout date for the reporting year. Under FRA's current reporting requirements, railroads are permitted until April 15 to close out their accident/incident records for the previous reporting year. Guide, Ch. 1, p. 11. FRA proposes to amend its Guide to extend the deadline for completing such accident/incident reporting records until December 1, and will extend the deadline even beyond that date on a case-by-case basis for individual records or cases, if warranted.

J. Proposed Revisions to Chapter 6 of the Guide, Pertaining to Form FRA F 6180.55a, ''Railroad Injury and Illness Summary (Continuation Sheet)''

FRA proposes to amend its Guide to bring it, for the most part, into conformity with OSHA's recently published Final Rule on recordkeeping and reporting. The Working Group also wanted to make it clear, by noting in Chapter 6, that railroads are not required to report occupational fatalities, injuries, and illnesses to OSHA if FRA and OSHA enter into an MOU that so provides.

Under OSHA's Final Rule, reporting requirements have changed in many ways, several of which are described below. See also proposed § 225.39 regarding FRA's treatment of cases reportable under proposed part 225 solely because of, *e.g.,* recommended days away from work that are not actually taken.

1. Changes in How Days Away From Work and Days of Restricted Work Are Counted

Under OSHA's Final Rule, if a doctor orders a patient to rest and not return to work for a number of days, or recommends that an employee engage only in restricted work, for purposes of reporting days away from work or restricted work, an employer must report the actual number of days that the employee was ordered not to return to work or was ordered to restrict the type of work performed, even if the employee decides to ignore the doctor's orders, and instead opts to return to work or to work without restriction. Specifically, under OSHA's Final Rule,

> If a physician or other licensed health care professional recommends days away, you should encourage your employee to follow that recommendation. However, the days away must be recorded whether the injured or ill employee follows the physician or licensed health care professional's recommendation or not.

29 CFR 1904.7(b)(3)(ii). The FRA agrees with the position taken by OSHA, that the employee should be encouraged to follow the doctor's advice about not reporting to work and or/taking restricted time to allow the employee to heal from the injury.

OSHA states a similar rule with respect to reporting the number of days of recommended restricted duty. Specifically, OSHA's Final Rule states,

> May I stop counting days if an employee who is away from work because of an injury or illness retires or leaves my company? Yes, if the employee leaves your company for some reason unrelated to the injury or illness, such as retirement, a plant closing, or to take another job, you may stop counting days away from work or days of restricted/job transfer. If the employee leaves your company because of the injury or illness, you must estimate the number of days away or days of restriction/job transfer and enter the day count on the 300 Log.

29 CFR 1904.7(b)(3)(viii). Contrarily, under FRA's current Guide, a railroad must report only the actual number of days that an employee does not return to work or is on restricted work duty due to a work-related injury or illness. ''A record of the actual count of these days must be maintained for the affected employee.'' *See* Guide, Ch. 6, pp. 13–14.

There was much discussion at the Working Group meetings of whether FRA should conform to OSHA's Final Rule with respect to reporting the number of days away from work or number of days of restricted duty. Some Working Group members wanted to leave FRA's current reporting system in place, while others saw merit in the

OSHA approach. FRA representatives met with OSHA representatives to address this issue. OSHA insisted that since it tracks an index of the severity of injuries, with days away from work being the most severe non-fatal injuries and illnesses, it was important to OSHA to maintain a uniform database and have those types of injuries captured in its statistics.

A compromise was reached on the issue of reporting the number of days away and number of days of restricted work activity that was acceptable both to the Working Group and, preliminarily, to OSHA. Specifically, FRA proposes that if no other reporting criteria apply but a doctor orders a patient to rest and not to report to work for a number of days, the railroad must report the case under a special category called ''covered data.'' The Guide would explain how this covered data would be coded. The principal purpose of collecting covered data is so that this information can be provided to the Department of Labor for inter-industry comparison. The general rule is as follows: Where a doctor orders days of rest for an employee, the railroad must report actual days away from work unless the employee reports for work the next day, in which case, the railroad must report one day. Note: If the employee takes more days than the doctor ordered, the railroad must still report actual days away from work unless the railroad can show that the employee should have returned to work sooner. The following examples illustrate the application of this principle in combination with existing requirements that would be carried forward.

- If the doctor orders the patient to five days of rest, and the employee reports to work the next day, the railroad must report one day away from work. (This case would be separately coded and not included in FRA accident/incident aggregate statistics.)
- If, on the other hand, the employee takes three days of rest, when the doctor ordered five days of rest, then the railroad must report the actual number of days away from work as three days away from work.
- Of course, if the doctor orders five days of rest and the employee takes five days of rest, then the railroad must report the full five days away from work.
- Finally, if the doctor orders five days of rest, and the employee takes more than the five days ordered, then the railroad must report the actual number of days away from work, unless the railroad can show that the employee should have returned to work sooner than the employee actually did.

An MOU between FRA and OSHA would address these issues.

FRA notes that it may be appropriate to take into consideration special circumstances in determining the appropriate reporting system for the railroad industry. While compensation for injuries and illnesses in most industries is determined under state-level worker compensation systems, which provide recovery on a ''no-fault'' basis with fixed benefits, railroad claims departments generally compensate railroad employees for lost workdays resulting from injuries or occupational illnesses. In the event a railroad employee is not satisfied with the level of compensation offered by the railroad, the injured or ill employee may seek relief under FELA, which is a fault-based system and subject to full recovery for compensatory damages. Further, railroad employees generally are subject to a federally-administered sickness program, which provides benefits less generous than under some private sector plans. Although it is not readily apparent in any quantitative sense how this combination of factors influences actual practices with respect to medical advice provided and employee decisions to return to work, very clearly the external stimuli are different than one would expect to be found in a typical workplace. Accordingly, it seems particularly appropriate that the Working Group found it wise to adopt a compromise approach that blends the new OSHA approach with the traditional emphasis on actual outcomes. The approach described above will foster continuity in rail accident/incident trend analysis while permitting inter-industry comparability, as well.

2. Changes in the ''Cap'' on Days Away From Work and Days Restricted; Including All Calendar Days in the Count of Days Away From Work and Days of Restricted Work Activity

In addition, to conform to OSHA's Final Rule, FRA proposes to amend its Guide to lower the maximum number of days away or days of restricted work activity that must be reported, from 365 days to 180 days, and to change the method of counting days away from work and days of restricted work activity. The Working Group noted that counting calendar days is administratively simpler for employers than counting scheduled days of work that are missed. Using this simpler method of counting days away from work provides employers who keep records some relief from the complexities of counting days away from work under FRA's former system. Moreover, the calendar day approach makes it easier to compare an injury/illness date with a return-to-work date and to compute the difference between those two dates. The calendar method also facilitates computerized day counts. In addition, calendar day counts will also be a better measure of severity, because they will be based on the length of disability instead of being dependent on the individual employee's work schedule. Accordingly, FRA proposes to adopt OSHA's approach of counting calendar days because this approach is easier than the former system and provides a more accurate and consistent measure of disability duration resulting from occupational injury and illness and thus will generate more reliable data. Currently, under FRA's Guide, days away from work and days of restricted work activity are counted only if the employee was scheduled to work on those days. In the proposed Guide, because it is a preferred approach, and to be consistent with OSHA's Final Rule, days away from work would include all calendar days, even a Saturday, Sunday, holiday, vacation day, or other day off, after the day of the injury and before the employee reports to work, even if the employee was not scheduled to work on those days.

3. Definitions of ''Medical Treatment'' and ''First Aid''

FRA's current Guide states what constitutes ''medical treatment'' and what constitutes ''first aid'' and how to categorize other kinds of treatment. *See* Guide, Ch. 6, pp. 6–9. As stated in the current Guide, ''medical treatment'' renders an injury reportable. If an injury or illness requires only ''first aid,'' the injury is not reportable, but will, instead, be accountable. Under OSHA's Final Rule, a list is provided of what constitutes ''first aid.'' 29 CFR 1904.7(b)(5). If a particular procedure is not included on that list, and does not fit into one of the two categories of treatments that are expressly defined as not medical treatment (diagnostic procedures and visits for observation or counseling), then the procedure is considered to be ''medical treatment.'' *Id.* FRA proposes to amend its regulations and Guide to conform to OSHA's definition and new method of categorizing what constitutes medical treatment and first aid. Specifically, FRA proposes to amend its regulations and the Guide to address the following four items:

a. Counseling. Under FRA's ''definitions'' section of its regulations,

* * * Medical treatment also does not include preventive emotional trauma counseling provided by the railroad's employee counseling and assistance officer unless the participating worker has been diagnosed as having a mental disorder that was significantly caused or aggravated by an accident/incident and this condition requires a regimen of treatment to correct.

See § 225.5. Contrarily, under OSHA's Final Rule, ''medical treatment does not include: (A) Visits to a physician or other licensed health care professional solely for observation or counseling * * *.'' Emphasis added. *See* 29 CFR 1904.7(b)(5)(i). Accordingly, to conform to OSHA's Final Rule, FRA proposes to amend its definition of ''medical treatment'' to exclude counseling as a type of medical treatment. *See* proposed § 225.5.

b. Eye patches, butterfly bandages, Steri-Strips™, and similar items Under FRA's current Guide, use of an eye patch, butterfly bandage, Steri-Strip™, or similar item is considered medical treatment, rendering the injury reportable. Under OSHA's Final Rule, however, use of an eye patch, butterfly bandage, or Steri-Strip™ is considered to be first aid and, therefore, not reportable. In order to conform FRA's Guide to OSHA's Final Rule, FRA proposes to amend the Guide so that use of an eye patch, butterfly bandage, or Steri-Strip™ will be considered to be first aid.

c. Immobilization of a body part Under FRA's current Guide, immobilization of a body part for transport purposes is considered medical treatment. Given, however, that OSHA's Final Rule considers immobilization of a body part for transport to be first aid, FRA proposes to amend its Guide so that immobilization of a body part for transport would be considered first aid.

d. Prescription versus non-prescription medication Under FRA's current Guide, a doctor's order to take over-the-counter medication is not considered medical treatment even if a doctor orders the over-the-counter medication at prescription strength. Under OSHA's Final Rule, however, a doctor's order to take over-the-counter medication at prescription strength is considered medical treatment rather than first aid. For example, under OSHA's Final Rule, if a doctor orders a patient to take simultaneously three 200 mg. tablets of over-the-counter Ibuprofen, since 467 mg. of Ibuprofen is considered to be prescription strength, this case would be reportable.

The Working Group struggled with this issue. On the one hand, it is a legitimate concern that reportability not be manipulated by encouraging occupational clinics to substitute a non-prescription medication when a prescription medication is indicated. That result, however, may be more humane than a circumstance in which the medical provider is encouraged not to order an appropriate dosage.

Further, in some cases, physicians may direct the use of patent medicines simply to save the employee the time to fill a prescription or simply to hold down costs to the insurer; and the physician may find the over-the-counter preparation to be more suitable in terms of formulation, including rate of release and absorption.

As in the case of recommended days away from work not taken (discussed above), the Working Group settled on a compromise position. Where the treating health care professional directs in writing the use of a non-prescription preparation at a dose at least that of the minimum prescribed amount, and no other reporting criteria apply, the railroad would report this as a special case (''covered data'' under §§ 225.5 and 225.39). FRA will explore whether it is practical to add to Chapter 6 of the Guide, a list of commonly used over-the-counter medications, including the prescription strength for those medications. This list of over-the-counter medications would conform to OSHA's published standards. Future over-the-counter medication added by OSHA would be posted on FRA's Web site. The case would be included in aggregate data provided to the Department of Labor, but would not be included in FRA's periodic statistical summaries. FRA would have the data available to reference, and if a pattern of apparent abuse emerged, FRA could both examine the working conditions in question and also review possible further amendments to these reporting regulations.

K. Proposed Revisions to Chapter 7 of the Guide, ''Rail Equipment Accident/Incident Report''

FRA proposes to amend Chapter 7 of the Guide to include the new codes for remote control locomotive operations, and for reporting the location of a rail equipment accident/incident using longitude and latitude variables.

L. Proposed New Chapter 12 of the Guide on Reporting by Commuter Railroads

FRA has been faced with a number of commuter rail service accident reporting issues. For example, in reviewing accident/incident data using automated processing routines, FRA could not distinguish Amtrak's commuter activities from its intercity service, and could not always distinguish between a commuter railroad that ran part of its operation and contracted for another part of its operation with a freight railroad. FRA developed alternative strategies with the affected railroads for collecting these data to ensure that commuter rail operation accurately reflected the entire scope of operations, yet did not increase the burden of reporting for affected railroads. This issue also arose in the context of an NTSB Safety Recommendation, R–97–11, following NTSB's investigation of a collision on February 16, 1996, in Silver Spring, Maryland, between an Amtrak passenger train and a MARC commuter train. During the accident investigation, NTSB requested from FRA, a five-year accident history for commuter railroad operations. FRA was not, however, able to provide a composite accident history for some of the commuter railroad operations because some of the commuter operations were operated under contract with Amtrak and other freight railroads, and the accident data for some commuter railroads were commingled with the data of Amtrak and the other contracted freight railroads. Accordingly, NTSB's Safety Recommendation R–97–11 addressed to FRA read, ''Develop and maintain separate identifiable data records for commuter and intercity rail passenger operations.''

When the RSAC Task Statement 2001–1 was presented, FRA determined that a new chapter in the Guide was needed to address NTSB's and FRA's concerns regarding commuter railroad reporting. At the initial May 2001 meeting, FRA representatives presented the issue to the Working Group. FRA representatives were tasked to develop a chapter specifically dealing with commuter rail reporting. In the August 2001 Working Group meeting, FRA presented a draft of the new chapter. A task group was formed that included representatives of Amtrak, Metra, APTA, and FRA. The new Chapter 12 was presented in November of 2001 to the entire Working Group, and the Working Group accepted the chapter in its entirety.

M. Proposed Changes in Reporting of Accidents/Incidents Involving Remote Control Locomotives

An FRA notice entitled, ''Notification of Modification of Information Collection Requirements on Remote Control Locomotives,'' says that the Special Study Blocks on the rail equipment accident report and highway-rail crossing report, as well as special codes in the narrative section of

the ''Injury and Illness Summary Report (Continuation Sheet),'' are for only temporary use until part 225 and the Guide are amended. 65 FR 79915, Dec. 20, 2000. At the November 2001 Working Group meeting, some members brought up this statement in FRA's notice and the need to craft regular means for reporting accidents/incidents involving remote control locomotives (RCL). In response, a special task group was formed to study the reporting of RCL-related rail equipment accidents, highway-rail crashes, and casualties.

In December of 2001, the task group initially decided to recommend modifying the ''Rail Equipment Accident/Incident Report Form'' (FRA F 6180.54) and the ''Highway-Rail Grade Crossing Accident/Incident Report Form'' (FRA F 6180.57) to add an additional block to capture RCL operations, but the task group was not able to reach consensus on the ''Injury and Illness Summary Report (Continuation Sheet)'' (FRA F 6180.55a).

Railroad representatives were concerned about modifying the accident/incident database with additional data elements. The FRA representatives proposed a new, modified coding scheme that utilized the Probable Reason for Injury/Illness Code field in the set of Circumstance Codes and also included some additional Event Codes and two special Job Codes.

During a subsequent Working Group meeting, a new element was added as Item 30a, ''Remote Control Locomotive,'' on the ''Rail Equipment Accident/Incident Report'' form to allow entry of one of four possible values:

''0''—Not a remotely controlled operation;

''1''—Remote control portable transmitter;

''2''—Remote control tower operation; and

''3''—Remote control portable transmitter—more than one remote control transmitter.

For the ''Highway-Rail Grade Crossing Accident/Incident Report'' form to capture RCL operations, the ''Rail Equipment Involved'' block would be modified to add three additional values:

''A''—Train pulling—RCL;

''B''—Train pushing—RCL; and

''C''—Train standing—RCL.

These recommendations were accepted by the Working Group, as well as the changes in the Job Codes and Circumstance Codes for the ''Injury and Illness Summary Report (Continuation Sheet).''

N. Proposed Changes in Circumstance Codes (Appendix F of the Guide)

Prior to 1997, the ''Injury and Illness Summary Report (Continuation Sheet)'' contained a field called ''Occurrence Code.'' The field attempted to describe what a person was doing at the time the person was injured. Often the action of the injured person was the same, but the equipment involved was different, so a different Occurrence Code was needed for each situation, *e.g.*, person getting off locomotive, person getting off freight car, person getting off passenger car. Another problem with the Occurrence Code was that the code did not provide the information necessary to explain the incident, *e.g.*, if the injury was electric shock, the Occurrence Code was ''using hand held tools,'' so FRA could not tell from the report if the electrical shock was from the hand tool, the third rail, lightning, or drilling into a live electric wire.

To address these concerns, the Occurrence Code field was replaced in 1997 with the Circumstance Code field. The change allowed for more flexibility in describing what the person was doing when injured. Under the broad category of Circumstance Codes, FRA had developed five subsets of codes: Physical Act; Location; Event; Tools, Machinery, Appliances, Structures, Surfaces (etc.); and Probable Reason for Injury/Illness.

During the next five years, FRA and the railroad reporting officers realized that there were still gaps in the codes. FRA proposed expanding the list of Circumstance Codes and determined that some injuries and fatalities should always be reported using a narrative. Also, some Circumstance Codes required the use of narratives. In the July 2001 Working Group meeting, the railroads noted that expanded Circumstance Codes would assist in reporting and analysis. FRA asked the railroads to provide an expanded list of Circumstance Codes for the next meeting, with the understanding that a narrative would be required when the codes did not adequately describe the incident. By the September 2001 meeting, the railroads had produced many new codes, which FRA compiled and presented at the November 2001 meeting. At that meeting, rail labor discussed RCL reporting. In the January 2002 Working Group meeting, the members reviewed the compiled list, including the special RCL codes. The Working Group made recommendations to move some of the codes to other areas. In the March 2002 Working Group meeting, a task group was formed to resolve the remaining issues with respect to codes. Specifically, the Working Group started by referring to proposed codes that pertained to switching operations. These codes were Probable Reason codes that came out of a separate FRA Working Group on Switching Operations Fatality Analysis (SOFA). The task group revised the SOFA codes and added them to Appendix F. The entire Working Group then reviewed and voted to approve all of the task force's proposed codes.

O. Proposed Changes in Three Forms (Appendix H of the Guide)

The Working Group converted the Form FRA F 6180.78, ''Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor [and] Employee Statement Supplementing Railroad Accident Report,'' and Form FRA F 6180.81, ''Employee Human Factor Attachment'' to question-and-answer format, and simplified the language so that they are easier to understand. One issue raised was whether a specific warning related to criminal liability for falsifying the form should be included on the form. Some Working Group members believed that a warning would only serve to intimidate employees from filling out the form. FRA noted that it was important to put the warning on the form to deter employees from falsifying information on the forms. FRA also noted that the same warning would be included on the form for reporting officers. Given that labor representatives felt strongly that the language was too intimidating, it was agreed that a general warning would be included on the back of the form, and that the warning would not specifically state the penalties for falsifying information on the form. In addition, the Working Group agreed to propose to modify Form FRA F 6180.98 to include an item for the county in which the accident/incident occurred.

P. Miscellaneous Issues Regarding Part 225 of the Guide

1. Longitude and Latitude Blocks for Two Forms

Following discussions of this issue, the Working Group agreed that provision could be made for voluntarily reporting the latitude and longitude of a rail equipment accident/incident, a trespasser incident, and an employee fatality. FRA proposes to add blocks to the Form FRA F 6180.54 and Form FRA F 6180.55a for this information. The reason FRA is seeking to gather this information is to better determine if there is a pattern in the location of

certain rail equipment accidents/incidents, trespasser incidents, and employee fatalities. Geographic information systems under development in the public and private sectors provide an increasingly capable means of organizing information. Railroads are mapping their route systems, and increasingly accurate and affordable Global Positioning System (GPS) receivers are available and in widespread use.

2. Train Accident Cause Code ''Under Investigation'' (Appendix C of the Guide)

One of the tasks addressed by the Working Group was to define ''under investigation'' as that term is used in Cause Code M505, ''Cause under investigation (Corrected report will be forwarded at a later date),'' and to put that definition in Chapter 7 of the Guide, under subpart C, ''Instructions for Completing Form FRA F 6180.54,'' block 38, ''Primary Cause Code'' and Appendix C of the Guide. Currently, many accidents/incidents of a significant nature, *e.g.*, ones that are involved in private litigation for many years, are coded as ''under investigation.'' Even if FRA and the railroad think that they know the primary cause of an accident, some railroads will not assign a specific cause code to the accident, either for liability reasons, or because the railroad or a local jurisdiction, or some other authority is still investigating the accident.

To provide finality to the process of investigating an investigation, the Working Group agreed that ''under investigation'' would mean under active investigation by the railroad. When the railroad has completed its own investigation and received all laboratory results the railroad must make a ''good faith'' determination of the primary cause of the accident, any contributing causes, and their proper codes. The railroad must not wait for FRA or NTSB to complete its investigation before assigning a cause code. After FRA or NTSB completes its investigation, the railroad may choose to amend the cause code on the accident report. Accordingly, FRA proposes to revise the Guide to show that the meaning of the cause code in question has been changed to ''Cause under active investigation by reporting railroad (Amended report will be forwarded when reporting railroad's active investigation has been completed).''

In addition, the Working Group agreed to add a new code ''M507'' to denote accidents/incidents in which the investigation is complete but the cause of the accident/incident could not be determined. If a railroad uses this code, the railroad would be required to include in the narrative block, an explanation for why the cause of the accident/incident could not be determined.

3. ''Most Authoritative'': Determining Work-Relatedness and Other Aspects of Reportability

The duty to report work-related illnesses under the current rule has occasioned concern and disagreement about not only whether an illness exists, but, more importantly and more controversially, whether the illness is work-related. Often an employee's doctor's opinion is that an employee's illness is work-related, while the railroad's doctor's opinion is that the illness is not work-related. In providing guidance in how a reporting officer is to determine whether an illness is work-related, OSHA's Final Rule states,

> [the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Sec. 1904.5(b)(2) applies.

29 CFR 1904.5(a). In addition, the preamble to OSHA's Final Rule states,

> Accordingly, OSHA has concluded that the determination of work-relatedness is best made by the employer, as it has been in the past. Employers are in the best position to obtain the information, both from the employee and the workplace, that is necessary to make this determination. Although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer.

66 FR 5950.

Following publication of this Final Rule, the National Association of Manufacturers (NAM) filed a First Amended Complaint challenging portions of the Final Rule. As part of the NAM–OSHA settlement agreement, published in the **Federal Register**, the parties agreed to the following:

> Under this language [29 CFR 1904.5(a)], a case is presumed work-related if, and only if, an event or exposure in the work environment is a *discernable* cause of the injury or illness or of a *significant* aggravation to pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause.
>
> Section 1904.5(b)(2) states that a case is not recordable if it ''involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.'' This language is intended as a restatement of the principle expressed in 1904.5(a), described above. Regardless of where signs or symptoms surface, a case is recordable only if a work event or exposure is a *discernable* cause of the injury or illness or of a *significant* aggravation to a pre-existing condition.
>
> Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, *the employer* ''must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or *significantly* aggravated a pre-existing condition.'' This means that *the employer* must make a determination whether it is *more likely than not* that work events or exposures were a cause of the injury or illness, or a *significant* aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related.

(Emphasis added.) 66 FR 66944. FRA proposes to conform to this language, particularly with respect to making reference to the terms ''discernable'' and ''significant'' to qualify the type of causation and aggravation, respectively. *See* proposed definition of ''accident/incident'' and proposed reportability criteria at proposed § 225.19(d).

The other part of the problem of determining whether an injury or illness is work-related is ''who decides.'' The Working Group proposed to adopt OSHA's Final Rule definition of ''most authoritative'' stated in OSHA's Final Rule. In the context of discussing how to determine whether or not a case is new, OSHA's Final Rule states,

> If you receive recommendations from two or more physicians or other licensed health care professionals, you must make a decision as to which recommendation is the most authoritative (best documented, best reasoned, or most [persuasive]) and record the case based upon that recommendation.

29 CFR 1904.6(b)(3). (Note: the preamble to OSHA's Final Rule uses the word ''persuasive'' while the rule text uses the word ''authoritative'' where FRA put the word ''persuasive'' in brackets. FRA chose to use the language from the preamble, instead of that in the rule text, to avoid redundancy.)

The question of who is the ''most authoritative'' physician or other licensed health care professional arises in a number of contexts when there is a conflict of medical opinion. Conflicting medical opinions, often between an employee's physician and a railroad's company physician, arise

regarding whether an injury or illness is work-related, whether and how many days away from work an employee needs to recuperate from a work-related injury or illness, and whether a fatality was work-related, or arose from the operation of a railroad. FRA proposes to adopt in its Guide OSHA's definition in its Final Rule of ''most authoritative,'' and to adopt the language from the NAM–OSHA settlement agreement in order to resolve this issue. (*See also* discussion of FRA review of work-relatedness determinations under section ''III.G.2.b.'' of the preamble.)

4. Job Title versus Job Function

An additional issue resolved by the Working Group was to propose to amend the Guide's instructions for completing blocks 40–43 of FRA Form F6180.54 to make it clear that the job function of the employee, rather than the employee's job title, would be used to determine the employee's job title for reporting purposes, when the railroad gives the employee a job title other than ''engineer,'' ''fireman,'' ''conductor,'' or ''brakeman.''

5. ''Recording'' versus ''Reporting''

Under OSHA's Final Rule, the term ''recording'' is used. Under FRA's regulations and Guide, the term ''reporting'' is used. Since FRA has always used the term ''reporting'' and since one of the statutes authorizing part 225 uses the term ''reporting,'' FRA proposes to continue to use in its regulations and Guide the term ''reporting'' instead of ''recording.'' *See* 49 U.S.C. 20901(b)(1) (''In establishing or changing a monetary threshold for the reporting of a railroad accident or incident * * *'')

IV. Section-by-Section Analysis

Section 219.5 Definitions

For purposes of part 219, ''accident or incident reportable under Part 225'' would be defined to exclude a case that is classified as ''covered data'' under § 225.5 of this chapter (*i.e.*, employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead returned to work, or for a work restriction that was not imposed, or for a non-prescription medication recommended in writing to be taken at a prescription dose, whether or not the medication was taken). The term ''accident or incident reportable under Part 225'' appears in § 219.301(b)(2), in the description of an event that authorizes breath testing for reasonable cause:

* * * * *

The employee has been involved in an *accident or incident reportable under Part 225 of this chapter,* and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident;

* * * * *

[Emphasis added.] It should also be noted that § 219.301(b)(2) is incorporated by reference in § 219.301(c) as a basis for ''for cause drug testing.''

The definition of ''reportable injury'' would be revised to mean an injury reportable under part 225 of this chapter except for an injury that is classified as ''covered data'' under § 225.5 of this chapter. The term ''reportable injury'' appears in three provisions of part 219, each of which describes an event that triggers the requirement for post-accident toxicological testing: (i) A ''major train accident'' that includes a release of hazardous material lading with a ''reportable injury'' resulting from the release; (ii) an ''impact accident'' involving damage above the current reporting threshold and resulting in a ''reportable injury''; and (iii) a passenger train accident with a ''reportable injury'' to any person. §§ 219.201(a)(1)(ii)(B), 219.201(a)(2), and 219.201(a)(4).

The reason that ''accident or incident reportable under Part 225'' and ''reportable injury'' would not, for purposes of part 219, include covered data cases is that while these cases are of importance from the standpoint of rail safety analysis and therefore reportable, they are, nevertheless, comparatively less severe than fatalities, other injuries and illnesses and, as such, should not trigger alcohol and drug testing or related requirements and sanctions.

Section 225.5 Definitions

''Accident/incident'' would be redefined to conform to OSHA's Final Rule. Under FRA's current rule, ''accident/incident'' is defined in part as,

(3) Any event arising from the operation of a railroad which results in:
(i) Death to any person;
(ii) Injury to any person that requires medical treatment;
(iii) Injury to a railroad employee that results in:
(A) A day away from work;
(B) Restricted work activity or job transfer; or
(C) Loss of consciousness; or
(4) Occupational illness.

(The designation ''(4)'' in the definition above should read ''(iv).'' See § 225.19(d)(3).) The parallel language in FRA's proposed definition reads as follows:

''Accident/incident'' means:

* * * * *

(3) Any event or exposure arising from the operation of a railroad, if the event or exposure is a discernable cause of any of the following, and the following is a new case or a significant aggravation of a pre-existing injury or illness:
(i) Death to any person;
(ii) Injury to any person that results in medical treatment;
(iii) Injury to a railroad employee that results in:
(A) A day away from work;
(B) Restricted work activity or job transfer; or
(C) Loss of consciousness;
(iv) Occupational illness of a railroad employee that results in any of the following:
(A) A day away from work;
(B) Restricted work activity or job transfer;
(C) Loss of consciousness; or
(D) Medical treatment;
(v) A significant injury to or significant illness of a railroad employee diagnosed by a physician or other licensed health care professional even if it does not result in death, a day away from work, restricted work activity or job transfer, medical treatment, or loss of consciousness;
(vi) An illness or injury that meets the application of the following specific case criteria:
(A) A needlestick or sharps injury to a railroad employee;
(B) Medical removal of a railroad employee;
(C) Occupational hearing loss of a railroad employee;
(D) Occupational tuberculosis of a railroad employee; or
(E) An occupational musculoskeletal disorder of a railroad employee that is independently reportable under one or more of the general reporting criteria.

The phrase ''discernable cause'' would be included in the proposed definition, and the words ''or exposure'' would be added before the word ''arising.'' The addition of the word ''discernable'' is intended to take into account the OSHA–NAM settlement agreement, which also uses ''discernable'' to describe ''cause.'' As defined in *Webster's Third New International Dictionary, Unabridged* (1971), ''discernable'' means ''capable of being discerned by the senses or the understanding: distinguishable (a trend) (there was the outline of an old trunk-Floyd Dell).'' FRA understands why some Working Group members requested this change as a matter of conformity and to emphasize that the employer is not required to speculate regarding work-relatedness. By the same

token, FRA emphasizes that when confronted with specific claims regarding work-relatedness, it is the employer's responsibility to fairly evaluate those claims and opt for reporting if an event, exposure, or series of exposures in the workplace likely contributed to the cause or significantly aggravated the illness.

The Working Group agreed that the definition of ''accident/incident'' also needed to include that the case had to be a new case, or a significant aggravation of a pre-existing condition. This reference to a ''new case'' was added to conform to § 1904.4 of OSHA's Final Rule, and the reference to ''significant'' aggravation of a pre-existing condition was added to conform to the OSHA–NAM settlement agreement.

The inclusion of ''death to any person'' would remain the same. ''[I]njury to any person which requires medical treatment'' would be changed to ''Injury to any person that results in medical treatment'; no substantive change is proposed. Injury to a railroad employee that results in ''(A) A day away from work; (B) Restricted work activity or job transfer; or (C) Loss of consciousness' would not change. FRA would, however, change the existing rule that all occupational illnesses of railroad employees are to be reported and require that they be reported only under certain enumerated conditions. This would also make it clear that an occupational illness of an employee to a contractor to a railroad is not to be reported. Further, FRA proposes to add to its criteria for reportability ''significant injuries or illnesses,'' ''needlestick or sharps injuries,'' ''medical removal,'' ''occupational hearing loss,'' ''occupational tuberculosis,'' and an independently reportable ''occupational musculoskeletal disorder'' to railroad employees to track OSHA's Final Rule. Finally, as previously discussed, a three-tier definition of ''event or exposure arising from the operation of a railroad'' would be added.

The definition of ''accountable injury or illness'' would be revised by substituting the words ''railroad employee'' for ''railroad worker,'' and by adding the word ''discernably'' before the word ''associated.'' These are technical changes to bring the language into conformity with the rest of the regulatory text.

The definition of ''day away from work'' currently means ''any day subsequent to the day of the injury or diagnosis of occupational illness that a railroad employee does not report to work for reasons associated with his or her condition.'' § 225.5. Under the Guide, ''If the days away from work were entirely unconnected with the injury (*e.g.*, plant closing or scheduled seasonal layoff), then the count can cease at this time.'' Guide, Ch. 6, p. 31, question 34. FRA proposes to come closer to following OSHA's general recording criteria under 29 CFR 1904.7 of ''day away from work'' by proposing that the definition be ''any calendar day subsequent to the day of the injury or the diagnosis of the illness that a railroad employee does not report to work, or was recommended by a physician or other licensed health care professional not to return to work, as applicable, even if the employee was not scheduled to work on that day.'' Currently, if a doctor recommends that an employee not return to work, but the employee ignores the doctor's advice and returns to work anyway, this would not count as a day away from work. Under OSHA's Final Rule, however, the reporting entity would still have to count all the days the doctor recommended that the employee not work. As a compromise, FRA proposes that the railroad would have to report one day away from work, even if the employee actually returned to work on that day, as discussed previously in the preamble. The revision of the definition of ''day away from work'' is intended to take into account the new rule for reporting the number of days away from work.

The definition of ''day of restricted work activity'' would be revised for the same reason that FRA is proposing to revise the definition of ''day away from work.''

The definition of ''event or exposure arising from the operation of a railroad'' would be added to include, (1) with respect to a person who is on property owned, leased, or maintained by the railroad, an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity; (2) with respect to an employee of the railroad (whether on or off property owned, leased or maintained by the railroad), an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity; and (3) with respect to a person who is not a railroad employee and not on property owned, leased, or maintained by the railroad—(i) a train accident; a train incident; a highway-rail crossing accident/incident involving the railroad; or (ii) a release of a hazardous material from a railcar in the railroad's possession or a release of other dangerous commodity that is related to the performance of the railroad's rail transportation business. Accordingly, with respect to a person who is not a railroad employee and not on property owned, leased, or maintained by the railroad, the definition of ''event or exposure arising from the operation of a railroad'' is more narrow, covering a more limited number of circumstances than for persons who are either on railroad property, or for railroad employees whether on or off property owned, leased or maintained by the railroad. The justification for narrowing the set of circumstances in which a railroad would be required to report certain injuries and illnesses for events that occur off railroad property is because it is difficult for railroads to know about and follow up on injuries to persons who are not railroad employees. Even more so for persons who are not employees to contractors to a railroad, a reporting railroad would have difficulty tracking, for example, a slip and fall case of a passenger, who may subsequently seek medical treatment from his or her doctor, but not report this to the railroad. Railroads simply have more limited opportunity to know about injuries and illnesses to persons other than those who are injured on their property or who are employed by the railroad. Accordingly, injuries to such persons would not be considered for reporting purposes as events or exposures arising from the operation of the railroad.

The definition of ''medical treatment'' would be revised as discussed earlier in the preamble, to conform generally to OSHA's new definition under 29 CFR 1904.7(b)(5)(i) of ''medical treatment.'' The proposed definition reads,

> any medical care or treatment beyond ''first aid'' regardless of who provides such treatment. Medical treatment does not include diagnostic procedures, such as X-rays and drawing blood samples. Medical treatment also does *not* include counseling.

FRA proposes that any type of counseling, in and of itself, is not considered to be medical treatment. If, for example, a locomotive engineer witnesses a grade crossing fatality and subsequently is diagnosed as suffering from Post Traumatic Stress Syndrome as a result of the incident, and receives counseling for this, the case is not reportable. The only factors that would make the case reportable would be if, in addition to the counseling, the employee received prescription medication, such as tranquilizers, had a day away from work or was placed on restricted work, was transferred to another job, or met one of the other criteria for reportability in § 225.19(d). In addition to the general objective of

inter-industry conformity, this change is supported by the absence of meaningful interventions available to prevent such disorders. Although involvement in highway-rail crossing and trespass casualties is a known cause of stress in the railroad industry, FRA and its partners are already aware of that fact and are making every effort to prevent these occurrences. Further, the industry is actively engaged in preventive post-event counseling.

''General reportability criteria'' would mean the criteria set forth in § 225.19(d)(1)–(5).

''Medical removal'' would be defined as it is described in OSHA's recording criteria under 29 CFR 1904.9 for medical removal cases. ''Medical removal'' refers to removing an employee from a work location because that location has been determined to be a health hazard. FRA proposes that this definition would change automatically if OSHA elected to revise its recording criteria.

''Needlestick and sharps injury'' and ''new case'' would be defined in general conformity with OSHA's definitions of these terms under 29 CFR 1904.8 and 1904.6, respectively. ''Privacy concern case'' would be defined as in 29 CFR 1904.29, except that FRA would categorically exclude MSDs from privacy concern cases. As discussed in section ''III.G.1.,'' above, FRA seeks comment on whether or not FRA should adopt this exclusion, especially if OSHA's proposed January 1, 2004, delay takes effect, but in either case. FRA also seeks comment on whether it should adopt the proposed exclusion of MSDs from privacy concern cases as a fixed approach beginning on the effective date of FRA's final rule or whether FRA should ''float'' with OSHA, *i.e.*, make the existence or nonexistence of the exclusion contingent on OSHA's action.

''Occupational hearing loss'' would be defined as OSHA currently defines it under 29 CFR 1904.10 for calendar year 2002. As discussed in section ''III.D.1.,'' above, FRA seeks comment on whether FRA should adopt OSHA's new approach for calendar year 2003 as its fixed approach, beginning on the effective date of FRA's final rule, or whether FRA should diverge from OSHA and continue to enforce OSHA's current approach (which was approved by the Working Group and the RSAC and is the same as FRA's current approach) as a fixed approach beginning on the effective date of FRA's final rule.

The definition of ''occupational illness'' has been revised to make it clear that only certain occupational illnesses of a person classified under Chapter 2 of the Guide as a Worker on Duty—Employee are to be reported. Contrarily, under the current definition of ''occupational illness'' other categories of persons, such as Worker on Duty—Contractor, are included in the definition, but illnesses to those persons are not reportable because § 225.19(d)(4) limits the reportability of occupational illnesses to those of ''a railroad employee.''

''Occupational musculoskeletal disorder'' would be defined essentially as it is set forth by OSHA in 29 CFR 1904.12. One of the most common forms of occupational musculoskeletal disorder is Carpal Tunnel Syndrome and other repetitive motion disorders. Under 1904.12 of its January 19, 2001, Final Rule, OSHA defines musculoskeletal disorders (MSDs) as:

> disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

66 FR at 6129. *See also* 66 FR at 52034. However, as noted in the overview in Section I of this preamble, OSHA has delayed the effective date of this provision from January 1, 2002, to January 1, 2003, and has proposed to delay the effective date until January 1, 2004, ''to give [OSHA] the time necessary to resolve whether and how MSDs should be defined for recordkeeping purposes.'' *See* 67 FR 44125. As the issue of OSHA's proposed delay of this provision was not before the Working Group when consensus was reached, FRA seeks comment on whether or not FRA should still adopt the above definition of MSDs if OSHA's proposed January 1, 2004, delay takes effect. If FRA goes forth with the provision as approved by the Working Group, FRA would be adopting the definition in advance of OSHA's defining of the term, a result that may not have been contemplated by the Working Group when it agreed to follow OSHA on this issue prior to the issuance of the proposed delay. *See* discussion concerning reporting criteria for MSDs at section III.D.1 of the preamble, above. Even if OSHA chooses not to delay the effective date of this provision, FRA seeks comment on whether or not we should even adopt OSHA's definition for calendar year 2003, since it states that there are no special criteria beyond the general recording criteria for determining which MSDs to record and because OSHA's definition appears to be used primarily as guidance for when to check the MSD column on the 300 Log. *See* 66 FR 6129–6130. Note that choosing to exclude this definition from FRA's final rule would not affect an employer's obligation to report work-related injuries and illnesses involving muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs in accordance with the requirements applicable to any injury or illness. If the definition of MSD were to be omitted from the Final Rule, this difference would be discussed in the MOU. FRA also seeks comment on whether or not this definition should ''float'' with OSHA's. *See* discussion of ''float'' vs. ''fixed'' at section III.D.1 of the preamble, above.

''Occupational tuberculosis'' would be defined in general conformity with OSHA's recording criteria under 29 CFR 1904.11 for work-related tuberculosis cases. The word ''occupational'' would be included in the term because the term is intended to cover only the occupational illness and it would be confusing to define simply ''tuberculosis'' when the unmodified term would seem to call for medical definition of tuberculosis in general.

''Significant change in the number of reportable days away from work'' would be defined as a ten-percent or greater change in the number of days away from work that the railroad would have to report. FRA decided on ten percent as the threshold so that railroads would not have to submit amended reports for *de minimis* changes in data. For example, if a railroad estimated that an employee would be away from work for 30 days and reported the 30-day estimate to FRA, and the employee was actually away from work for 32 days, the railroad would not have to amend its accident report to reflect this change. Moreover, FRA uses a ten-percent threshold for amending rail equipment accident reports. Specifically, if a railroad estimates the damage from a rail equipment accident to be $7,000, a railroad need not amend that report unless the actual damage exceeds $7,700. If on the other hand, the actual damage is less than the reporting threshold, but less than ten percent difference from the estimate, the railroad would be allowed to amend the report to indicate that the incident was not a reportable accident. For example, in the scenario above, if the actual damage was $6,400 (less than 10-percent difference from the $7,000 estimate), the railroad would nevertheless be permitted not to report the incident. While the ten-percent threshold is currently in Chapter 6 of the Guide, FRA proposes to create a

definition in the regulatory text since the General Accounting Office recommended that FRA define this term.

For clarification of the terms ''Significant illness'' and ''Significant injury'', see discussion earlier in section ''III.D.1.'' of the preamble, above.

Section 225.9 Telephonic Reports of Certain Accidents/Incidents and Other Events

Currently, § 225.9 requires a railroad to report immediately by telephone any accident/incident arising from the operation of the railroad that results in the death of a railroad employee or railroad passenger or the death or injury of five or more persons. FRA proposes an amendment to this section, as recommended by the Working Group, to add new circumstances under which a railroad is to telephonically report and to clarify existing procedures for telephonic reporting of the expanded list of events.

Proposed subsection (a) lists the events that a railroad would be required to report telephonically. In proposed subsection (a)(1), ''Certain deaths or injuries,'' FRA proposes that each railroad must report immediately, whenever it learns of the occurrence of an accident/incident that arose from the operation of the railroad, or an event or exposure that may have arisen from the operation of the railroad, that has certain specified consequences. FRA proposes to use the phrase ''may have arisen'' in the proposed regulatory text, instead of keeping the current language ''arising from the operation of a railroad,'' because a railroad may not learn for some time that a particular event in fact arose from the operation of the railroad. By stating that a railroad must report an event that ''may'' have arisen from the operation of the railroad, FRA is assured to capture a broader group of cases. For example, if a railroad employee dies of a heart attack on the railroad's property, the railroad may not know for weeks, following a coroner's report, what the cause of death was, and whether the death was work-related. This case might not get immediately reported because the railroad did not immediately learn that the death arose out of the operation of a railroad. Under the proposed change, if the death ''may'' have arisen out of the operation of the railroad, the case would be immediately reported, permitting FRA to commence its investigation in a timely manner. Even when death is ultimately determined to be caused by a coronary event, for instance, it is appropriate to inquire whether unusual workplace stressors (*e.g.*, extreme heat, excessive physical activity without relief) may have played a role in causing the fatality. In addition, under subsection (a)(1), FRA would add the death of an employee of a contractor to a railroad performing work for the railroad on property owned, leased, or maintained by the contracting railroad as a new category for telephonic reporting.

In proposed subsection (a)(2), FRA would capture certain train accidents or train incidents, even if death or injury does not necessarily occur as a result of the accident or incident. Currently, FRA does not require telephonic reporting of certain train accidents or train incidents *per se,* but requires that they be reported only if they result in death of a rail passenger or employee, or death or injury of five or more persons. Accordingly, FRA proposes that railroads telephonically report immediately, whenever it learns of the occurrence of any of the following events:

(i) A train accident that results in serious injury to two or more train crewmembers or passengers requiring admission to a hospital;

(ii) A train accident resulting in evacuation of a passenger train;

(iii) A fatality at a highway-rail grade crossing as a result of a train accident or train incident;

(iv) A train accident resulting in damage (based on a preliminary gross estimate) of $150,000, to railroad and nonrailroad property; or

(v) A train accident resulting in damage of $25,000 or more to a passenger train and railroad and nonrailroad property.

In proposed subsection (a)(3), FRA would require telephonic reporting of incidents in which reportable derailment or collision occurs on, or fouls, a line used for scheduled passenger service. This final provision would permit more timely initiation of investigation in cases where the underlying hazards involved could threaten the safety of passenger operations.

For clarification of other aspects of this proposed section, see discussion at section ''III.C.'' of this preamble, above.

Section 225.19 Primary Groups of Accidents/Incidents

FRA proposes to amend subsection (d), ''Group III, ''Death, injury, occupational illness.'' See prior discussion in section-by-section analysis of the definition of ''accident/incident'' and ''event or exposure arising from the operation of a railroad.'' Proposed 225.5.

Section 225.23 Joint Operations

FRA proposes to make technical amendments to § 225.23(a) simply to bring it into conformity with the rest of the proposed regulatory text.

Section 225.25 Recordkeeping

FRA proposes to amend this section by revising subsection 225.25(h)(15) to apply to ''privacy concern cases.'' Accordingly, under the proposed subsection, a railroad is permitted not to post information on an occupational injury or illness that is a ''privacy concern case.'' ''Privacy concern case'' would be defined in proposed § 225.5.

Section 225.39 FRA Policy Statement on Covered Data

In connection with the requirements for reporting employee illness/injury cases exclusively resulting from a written recommendation of a physician or other licensed health care provider (POLHCP) for time off when the employee instead returned to work, or a written recommendation for a work restriction that was not imposed, and in connection with the provision for special reporting of cases exclusively resulting from the direction of a POLHCP in writing to take a non-prescription medication at prescription dose, FRA proposes to express its policy that these cases would not be included in FRA's regular statistical summaries. The data are requested by the Department of Labor to ensure comparability of employment-related safety data across industries. The data may also be utilized for other purposes as the need arises, but they would not be reported in FRA's periodic statistical summaries for the railroad industry.

Section 240.117 Criteria for Consideration of Operating Rules Compliance Data

FRA proposes a minor change to its locomotive engineer qualifications regulations, which uses a term from part 225. In particular, § 240.117(e)(2) of the locomotive engineer qualifications regulations defines one of the types of violations of railroad rules and practices for the safe operation of trains that is a basis for decertifying a locomotive engineer: failures to adhere to the conditional clause of a restricted speed rule ''which cause reportable accidents or incidents under part 225 of this chapter. * * *'' This proposed amendment would create an exception for accidents or incidents that are classified as ''covered data'' under proposed part 225. ''Covered data'' would be defined as accidents or incidents that are reportable only because a physician or other licensed health care professional recommended in writing that a railroad employee take one or more days away from work, that

the employee's work activity be restricted for one or more days, or that the employee take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the medication is taken. The reason that ''covered data'' would be excluded as a partial basis for decertification under § 240.117(e)(2) is that the injuries and illnesses associated with ''covered data'' cases are comparatively less severe than other types of injuries and illnesses, and, as such, when coupled with a violation of restricted speed, should not trigger a decertification hearing under part 240.

V. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the DOT Docket Management System at *http://dms.dot.gov.* FRA invites comments on this regulatory evaluation.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of costs and a qualitative discussion of the benefits expected from the adoption of this proposed rule. Over a 20-year period, the Present Value (PV) of the estimated costs is $410 thousand, and the PV of the estimated benefits is $612 thousand.

The major costs anticipated from adopting this proposed rule include those incurred in complying with additional OSHA-conformity reporting requirements, such as the covered data cases. Additional reporting burdens will also occur from an increase in telephonic reporting, and from the reporting of claimed occupational illnesses cases by railroads. Finally, there are costs associated with the familiarization of the railroad reporting officers with the revised *Guide,* and for revisions to FRA and railroad electronic reporting systems and databases.

The major benefits anticipated from implementing this proposed rule include savings from a simplification in the reporting of occupational injuries due to a new definition of ''first aid.'' This benefit will produce a savings in the decision making process for both reportable injuries and accountable injuries. Additional savings would also occur from a reduction in the average burden time to complete a Rail Equipment Accident/Incident Report. This savings is largely a product of a revision to the train accident cause codes. The revised casualty circumstance codes would produce a savings from a reduction in the use of the narrative block on the railroad injury and illness reports. Finally, railroads should receive a savings from a simplification in counting the number of days away from work or of restricted work activity. This includes a savings due to a reduction from 365 to 180 days for the maximum number of days that the railroads would have to track and report injuries and illnesses. FRA also anticipates that there would also be qualitative benefits from this rulemaking from better data or information on railroad reports, and the increased utility that the additional data codes would provide to future analysis.

B. Regulatory Flexibility Act of 1980 and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires a Federal agency to review its proposed and final rules in order to assess their impact on small entities (small businesses, small organizations, and local governments). If the agency determines that its proposed rule would have a significant economic impact on a substantial number of small entities, then the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA). If the agency determines the opposite, then the agency must certify that determination; an IRFA may also provide the basis for the agency's determination that the proposed rule would not have a significant economic impact on a substantial number of small entities.

''Small entity'' is defined in 5 U.S.C. 601 as including a small business concern that is independently owned and operated, and is not dominant in its field of operation. The Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity'' is 1,500 employees for ''Line-Haul Operating'' Railroads, and 500 employees for ''Switching and Terminal Establishments.'' SBA's ''size standards'' may be altered by Federal agencies on consultation with SBA and in conjunction with public comment. Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FRA has published an interim policy that formally establishes ''small entities'' as being railroads that meet the line-haulage revenue requirements of a Class III railroad. 62 FR 43024, Aug. 11, 1997. Currently, the revenue requirements are $20 million or less in annual operating revenue. The $20 million limit is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment. *See* 49 CFR Part 1201. The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA proposes to use this alternative definition of ''small entity'' for this rulemaking. Since this is still considered to be an alternative definition, FRA is using this definition in consultation with the Office of Advocacy, SBA, and therefore requests public comment on its use.

Like the Regulatory Flexibility Act of 1980, a recently published executive order also establishes rulemaking procedures related to small entities. Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' requires in part that a Federal agency notify the Chief Counsel for Advocacy of the SBA of any of its draft rules that would have a significant economic impact on a substantial number of small entities, to consider any comments provided by the SBA, and to include in the preamble to the final rule the agency's response to any written comments by the SBA unless the agency head certifies that including such material would not serve the public interest. 67 FR 53461 (Aug. 16, 2002).

In accordance with the Regulatory Flexibility Act of 1980, FRA has prepared and placed in the docket an IRFA, which assesses the small entity impact of this proposed rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2002–13221, Notice No. 1.

As stated in the IRFA, FRA has determined that there are over 650 small railroads that could potentially be affected by this proposal; however, the

frequency of accidents/incidents, and therefore reporting burden, is generally proportional to the size of the railroad. A railroad that employs thousands of employees and operates trains millions of miles is exposed to greater risks than one whose operation is substantially smaller, all other things being equal. For example, in 1998, only 327 railroads reported one or more casualties.

The economic impacts from this proposed regulation are primarily a result of an increase in casualty reporting due to the reporting of some casualties, due to OSHA recordkeeping requirements which this rulemaking is adopting into FRA reporting requirements. In addition, the railroad industry will incur small burdens for an increase in telephonic reporting of some accident/incidents, and for modifications made to computer software and databases, however, FRA does not anticipate that any of these burdens will be imposed on small entities due to the decreased likelihood of a casualty occurring on a small railroad. The computer-based burdens are not expected to impact small entities either since most small railroads report using personal computer (PC)-based software provided by FRA. It is estimated by FRA that small entities will incur five percent or less of the total costs for this proposed rulemaking.

It is important to note that this proposed rule would also reduce recordkeeping burdens by simplifying the method used to count employee absences and work restrictions, and by reducing the requirement to keep track of lengthy employee absences. The proposed rule would also simplify reporting requirements with clarifying definitions for things such as ''medical treatment'' and ''first aid.'' Train accident cause codes and injury occurrence codes would be added, so that accident and injury data would be more precise and the need for some narratives would be eliminated.

This proposed rule would not provide alternative treatment for small entities in the regulation or reporting requirements. However, small railroads that report using PC-based software will not be burdened with any costs for modifying or changing the software, since FRA provides this software free to all railroads that utilize it. It is important to note that just by the fact that small railroads report fewer accidents/incidents and casualties, they are less likely to be burdened by the proposed rule.

The IRFA concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities; therefore, FRA certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities. For the same reason, consistent with Executive Order 13272, the draft rule has not been submitted to the SBA. However, FRA will consider any comments submitted by the SBA in developing the final rule. In order to determine the significance of the economic impact for the final rule's Regulatory Flexibility Assessment (RFA), FRA invites comments from all interested parties concerning the potential economic impact on small entities caused by this proposed rule. The Agency will consider the comments and data it receives—or lack of comments and data—in making a decision on the RFA for the final rule.

C. Paperwork Reduction Act of 1995

The information collection requirements in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section—49 CFR	Respondent universe responses	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
225.9—Telephone Reports—Certain Accidents/Incidents and Other Events.	685 railroads	500 Reports	15 minutes	125 hours	$5,250
225.11—Reporting of Rail Equipment Accidents/Incidents (Form FRA F 6180.54).	685 railroads	3,000 forms	2 hours	6,000 hours	$252,000
225.12(a)—Rail Equipment Accident/Incident Reports—Human Factor (Form FRA F 6180.81).	685 railroads	1,000 forms	15 minutes	250 hours	$10,500
225.12(b)—Rail Equipment Accident/Incident Repots—Human Factor (Part 1, Form FRA F 6180.78).	685 railroads	8,200 notices+copies.	10 minutes and 3 minutes.	527 hours	$22,134
225.12(c)—Rail Equipment Accident/Incident Reports—Human Factor—Joint Operations.	685 railroads	100 requests	20 minutes	33 hours	$1,386
225.12(d)—Rail Equipment Accident/Incident Reports—Human Factor—Late Identification.	685 railroads	20 attachments+20 notices.	15 minutes	10 hours	$420
225.12(e)—Rail Equipment Accident/Incident Reports—Human Factor—Employee Supplement (Part II, Form FRA F 6180.78).	685 railroads	75 statements	1.5 hours	113 hours	$2,938
225.12(f)—Rail Equipment Accident/Incident Reports—Human Factor—Employee Confidential Letter.	Railroad Employees	10 letters	2 hours	20 hours	$520
225.13—Amended Rail Equipment Accident/Incident Reports.	685 railroads	10 amended reports/20 copies.	1 hour+3 minutes	11 hours	$462
225.17—Doubtful Cases; Alcohol/Drug Involvement.	685 railroads	80 reports	30 minutes	40 hours	$1,680
—Appended Reports	685 railroads	5 reports	30 minutes	3 hours	$126
225.19—Highway-Rail Grade Crossing Accident/Incident Reports (Form FRA F 6180.57).	685 railroads	3,400 forms	2 hours	6,800 hours	$285,600

CFR Section—49 CFR	Respondent universe responses	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
—Death, Injury, or Occupational Illness (Form FRA F 6180.55a).	685 railroads	13,200 forms	20 minutes	4,400 hours	$184,800
225.21 Forms:					
—Form FRA F 6180.55—Railroad Injury/Illness Summary.	685 railroads	8,220 forms	10 minutes	1,370 hours	$57,540
—Form FRA 6180.56—Annual Report of Manhours By State.	685 railroads	685 forms	15 minutes	171 hours	$7,182
—Form FRA F 6180.98—RR Employee Injury and/or Illness Record.	685 railroads	18,000 forms	1 hour	18,000 hours	$756,000
—Form FRA F 6180.98—Copies	685 railroads	540 copies	2 minutes	18 hours	$756
—Form FRA F 6180.97—Initial Rail Equipment Accident/Incident Record.	685 railroads	13,000 forms	30 minutes	6,500 hours	$273,000
225.25—Posting of Monthly Summary	685 railroads	8,220 lists	16 minutes	2,191 hours	$92,064
225.27—Retention of Records	685 railroads	1,900 records	2 minutes	63 hours	$2,646
225.33—Internal Control Plans—Amended.	685 railroads	60 amendments	14 hours	840 hours	$35,280
225.35—Access to Records and Reports—Lists.	15 railroads	400 lists	20 minutes	133 hours	$5,586
—Subsequent Years	4 railroads	16 lists	20 minutes	5 hours	$210
225.37—Magnetic Media Transfers	8 railroads	96 transfers	10 minutes	16 hours	$672
—Batch Control (Form FRA F 6180.99).	685 railroads	200 forms	3 minutes	10 hours	$420

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning the following issues: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202–493–6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 17, Washington, DC 20590.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, entitled, ''Federalism,'' issued on August 4, 1999, requires that each agency ''in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met * * *.''

When issuing the proposed rule in this proceeding, FRA has adhered to Executive Order 13132. FRA engaged in the required Federalism consultation during the early stages of the rulemaking through meetings of the full RSAC, on which several representatives of groups representing State and local officials sit. To date, FRA has received only one concern about the Federalism implications of this rulemaking from these representatives, regarding whether or not FRA's notification requirements would preempt State accident notification requirements. Although our regulations under part 225 preempt States from prescribing accident/incident reporting requirements, there is nothing in our regulations that preempts States from having their own, perhaps even different, accident notification requirements:

> Issuance of these regulations under the federal railroad safety laws and regulations preempts States from prescribing accident/incident reporting requirements. Any State may, however, require railroads to submit to it copies of accident/incident and injury/illness reports filed with FRA under this part, for accident/incidents and injuries/illnesses which occur in that State.

49 CFR 225.1. FRA does not propose to change this provision that a State may require a railroad to submit to the State copies of reports required by part 225 regarding accidents in the State.

Additionally, section 20902 of title 49 of the United States Code, which authorizes the Secretary of Transportation to investigate certain accidents and incidents, provides: ''[i]f the accident or incident is investigated by a commission of the State in which it occurred, the Secretary, if convenient, shall carry out the investigation at the same time as, and in coordination with, the commission's investigation.'' This section contemplates that States have an

interest in carrying out simultaneous investigations in coordination with the Secretary, where convenient. It would be consistent with this interest to permit States to adopt their own accident notification requirements so as to allow a prompt, and perhaps coordinated, investigation. Accordingly, FRA believes that it has satisfied the Executive Order.

E. Environmental Impact

FRA has evaluated this regulation in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. *** The following classes of FRA actions are categorically excluded:

* * * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355, May 22, 2001. Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) that is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

List of Subjects

49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 225

Accident investigation, Penalties, Railroad safety, Railroads, Reporting and recordkeeping requirements.

49 CFR Part 240

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend Chapter II, Subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 219—[AMENDED]

1. The authority citation for part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

2. Section 219.5 is amended by adding a definition of *Accident or incident reportable under part 225* of this chapter and revising the definition of *Reportable injury* to read as follows:

§ 219.5 Definitions.

* * * * *

Accident or incident reportable under part 225 of this chapter does not include a case that is classified as ''covered data'' under § 225.5 of this chapter (*i.e.*, employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead returned to work, for a work restriction that was not imposed, or for a non-prescription medication at prescription strength, whether or not the medication was taken).

* * * * *

Reportable injury means an injury reportable under part 225 of this chapter except for an injury that is classified as ''covered data'' under § 225.5 of this chapter (*i.e.*, employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead returned to work, for a work restriction that was not imposed, or for a non-prescription medication at prescription strength, whether or not the medication was taken).

* * * * *

PART 225—[AMENDED]

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

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

4. Section 225.5 is amended as follows:

a. By revising paragraph (3) of the definition of the term *Accident/incident.*

b. By revising the definitions of the terms *Accountable injury or illness, Day*

away from work, Day of restricted work activity, Medical treatment, and *Occupational illness;*

c. By removing the term *Arising from the operation of a railroad* and its definition, and;

d. By adding definitions of *Covered data, Event or exposure arising from the operation of a railroad, General reporting criteria, Medical removal, Musculoskeletal disorder, Needlestick or sharps injury, New case, Occupational hearing loss, Occupational tuberculosis, Privacy concern case, Significant change in the number of reportable days away from work, Significant illness,* and *Significant injury.*

The revised and added text reads as follows:

§ 225.5 Definitions.

* * * * *

Accident/incident means:

* * *

(3) Any event or exposure arising from the operation of a railroad, if the event or exposure is a discernable cause of one or more of the following, and the following is a new case or a significant aggravation of a pre-existing injury or illness:

(i) Death to any person;

(ii) Injury to any person that results in medical treatment;

(iii) Injury to a railroad employee that results in:

(A) A day away from work;

(B) Restricted work activity or job transfer; or

(C) Loss of consciousness;

(iv) Occupational illness of a railroad employee that results in any of the following:

(A) A day away from work;

(B) Restricted work activity or job transfer;

(C) Loss of consciousness; or

(D) Medical treatment;

(v) Significant injury to or significant illness of a railroad employee diagnosed by a physician or other licensed health care professional even if it does not result in death, a day away from work, restricted work activity or job transfer, medical treatment, or loss of consciousness;

(vi) Illness or injury that meets the application of the following specific case criteria:

(A) Needlestick or sharps injury to a railroad employee;

(B) Medical removal of a railroad employee;

(C) Occupational hearing loss of a railroad employee;

(D) Occupational tuberculosis of a railroad employee; or

(E) Musculoskeletal disorder of a railroad employee that is independently reportable under one or more of the general reporting criteria.

Accountable injury or illness means any condition, not otherwise reportable, of a railroad employee that is discernably caused by an event, exposure, or activity in the work environment which condition causes or requires the railroad employee to be examined or treated by a qualified health care professional.

* * * * *

Covered data means a case involving an employee of a railroad that is reportable exclusively because a physician or other licensed health care professional recommended in writing that—

(1) The employee take one or more days away from work when the employee instead returned to work;

(2) The employee's work activity be restricted for one or more days when the work restriction was not imposed; or

(3) The employee take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the employee takes the medication.

Day away from work means any calendar day subsequent to the day of the injury or the diagnosis of the illness that a railroad employee does not report to work, or was recommended by a physician or other licensed health care professional not to return to work, as applicable, for reasons associated with the employee's condition even if the employee was not scheduled to work on that day.

Day of restricted work activity means any calendar day that an employee is restricted in his or her job following the day of the injury or the diagnosis of the illness, or was recommended by a physician or other licensed health care professional not to return to work, as applicable, for reasons associated with the employee's condition if the work restriction affects one or more of the employee's routine job functions or from working the full workday that the employee would otherwise have worked. An employee's routine job functions are those work activities that the employee regularly performs at least once per week.

* * * * *

Event or exposure arising from the operation of a railroad includes—

(1) With respect to a person who is on property owned, leased, or maintained by the railroad, an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity;

(2) With respect to an employee of the railroad (whether on or off property owned, leased or maintained by the railroad), an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity; and

(3) With respect to a person who is not an employee of the railroad and not on property owned, leased, or maintained by the railroad—an event or exposure directly resulting from the following railroad operations:

(i) A train accident, a train incident, or a highway-rail crossing accident or incident involving the railroad; or

(ii) A release of a hazardous material from a railcar in the possession of the railroad or of another dangerous commodity that is related to the performance of the railroad's rail transportation business.

* * * * *

General reporting criteria means the criteria listed in § 225.19(d)(1), (2), (3), (4), and (5).

* * * * *

Medical removal means medical removal under the medical surveillance requirements of an Occupational Safety and Health Administration standard in 29 CFR part 1910, even if the case does not meet one of the general reporting criteria.

Medical treatment means any medical care or treatment beyond ''first aid'' regardless of who provides such treatment. Medical treatment does not include diagnostic procedures, such as X-rays and drawing blood samples. Medical treatment also does *not* include counseling.

Musculoskeletal disorder (MSD) means a disorder of the muscles, nerves, tendons, ligaments, joints, cartilage, and spinal discs. The term does not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

Needlestick or sharps injury means a cut, laceration, puncture, or scratch from a needle or other sharp object that involves contamination with another person's blood or other potentially infectious material, even if the case does not meet one of the general reporting criteria.

New case means a case in which either the employee has not previously experienced a reported injury or illness of the same type that affects the same part of the body, or the employee previously experienced a reported

injury or illness of the same type that affected the same part of the body but had recovered completely (all signs had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear.

* * * * *

Occupational hearing loss means a diagnosis of occupational hearing loss by a physician or other licensed health care professional, under the criteria established by the Occupational Safety and Health Administration in 29 CFR 1904.10 for calendar year 2002, even if the case does not meet one of the general reporting criteria.

Occupational illness means any abnormal condition or disorder, as diagnosed by a physician or other licensed health care professional, of any person who falls under the definition for the classification of Worker on Duty—Employee, other than one resulting from injury, discernably caused by an environmental factor associated with the person's railroad employment, including, but not limited to, acute or chronic illnesses or diseases that may be caused by inhalation, absorption, ingestion, or direct contact.

Occupational tuberculosis means the occupational exposure of an employee to anyone with a known case of active tuberculosis if the employee subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional, even if the case does not meet one of the general reporting criteria.

* * * * *

Privacy concern case is any occupational injury or illness, other than a musculoskeletal disorder, in the following list:

(1) Any injury or illness to an intimate body part or the reproductive system;

(2) An injury or illness resulting from a sexual assault;

(3) Mental illnesses;

(4) HIV infection, hepatitis, or tuberculosis;

(5) Needlestick and sharps injuries; and

(6) Other illnesses, if the employee independently and voluntarily requests in writing to the railroad reporting officer that his or her injury or illness not be posted.

* * * * *

Significant change in the number of reportable days away from work means at least a ten-percent increase in the number of reportable days away from work compared to the number of reportable days away from work actually reported.

Significant illness means an illness involving cancer or a chronic irreversible disease such as byssinosis or silicosis, if the disease does not result in death, a day away from work, restricted work, job transfer, medical treatment, or loss of consciousness.

Significant injury means an injury involving a fractured or cracked bone or a punctured eardrum, if the injury does not result in death, a day away from work, restricted work, job transfer, medical treatment, or loss of consciousness.

* * * * *

5. Section 225.9 is revised to read as follows:

§ 225.9 Telephonic reports of certain accidents/incidents and other events.

(a) *Types of accidents/incidents and other events to be reported.* (1) *Certain deaths or injuries.* Each railroad must report immediately, as prescribed in paragraphs (b) through (d) of this section, whenever it learns of the occurrence of an accident/incident arising from the operation of the railroad, or an event or exposure that may have arisen from the operation of the railroad, that results in the—

(i) Death of a rail passenger or a railroad employee;

(ii) Death of an employee of a contractor to a railroad performing work for the railroad on property owned, leased, or maintained by the contracting railroad; or

(iii) Death or injury of five or more persons.

(2) *Certain train accidents or train incidents.* Each railroad must report immediately, as prescribed in paragraphs (b) through (d) of this section, whenever it learns of the occurrence of any of the following events that arose from the operation of the railroad:

(i) A train accident that results in serious injury to two or more train crewmembers or passengers requiring their admission to a hospital;

(ii) A train accident resulting in evacuation of a passenger train;

(iii) A fatality at a highway-rail grade crossing as a result of a train accident or train incident;

(iv) A train accident resulting in damage (based on a preliminary gross estimate) of $150,000, to railroad and nonrailroad property; or

(v) A train accident resulting in damage of $25,000 or more to a passenger train and railroad and nonrailroad property.

(3) *Train accidents on or fouling passenger service main lines.* The dispatching railroad must report immediately, as prescribed in paragraphs (b) through (d) of this section, whenever it learns of the occurrence of any train accident reportable as a rail equipment accident/incident under §§ 225.11 and 225.19(c)—

(i) That involves a collision or derailment on a main line that is used for scheduled passenger service; or

(ii) That fouls a main line used for scheduled passenger service.

(b) *Method of reporting.* (1) Telephonic reports required by this section shall be made by toll-free telephone to the National Response Center, Area Code 800–424–8802 or 800–424–0201.

(2) Through one of the same telephone numbers (800–424–0201), the National Response Center (NRC) also receives notifications of rail accidents for the National Transportation Safety Board (49 CFR part 840) and the Research and Special Programs Administration of the U.S. Department of Transportation (Hazardous Materials Regulations, 49 CFR 171.15). FRA Locomotive Safety Standards require certain locomotive accidents to be reported by telephone to the NRC at the same toll-free number (800–424–0201). 49 CFR 229.17.

(c) *Contents of report.* Each report must state the:

(1) Name of the railroad;

(2) Name, title, and telephone number of the individual making the report;

(3) Time, date, and location of the accident/incident;

(4) Circumstances of the accident/incident;

(5) Number of persons killed or injured; and

(6) Available estimates of railroad and non-railroad property damage.

(d) *Timing of report.* (1) To the extent that the necessity to report an accident/incident depends upon a determination of fact or an estimate of property damage, a report will be considered immediate if made as soon as possible following the time that the determination or estimate is made, or could reasonably have been made, whichever comes first, taking into consideration the health and safety of those affected by the accident/incident, including actions to protect the environment.

(2) NTSB has other specific requirements regarding the timeliness of reporting. *See* 49 CFR part 840.

6. In section 225.19, paragraph (d) is revised to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(d) *Group III—Death, injury, or occupational illness.* Each event or

exposure arising from the operation of a railroad shall be reported on Form FRA F 6180.55a if the event or exposure is a discernable cause of one or more of the following, and the following is a new case or a significant aggravation of a pre-existing injury or illness:

(1) Death to any person;

(2) Injury to any person that results in medical treatment;

(3) Injury to a railroad employee that results in:

(i) A day away from work;

(ii) Restricted work activity or job transfer; or

(iii) Loss of consciousness;

(4) Occupational illness of a railroad employee that results in any of the following:

(i) A day away from work;

(ii) Restricted work activity or job transfer;

(iii) Loss of consciousness; or

(iv) Medical treatment;

(5) Significant injury to or significant illness of a railroad employee diagnosed by a physician or other licensed health care professional even if it does not result in death, a day away from work, restricted work activity or job transfer, medical treatment, or loss of consciousness;

(6) Illness or injury that meets the application of the following specific case criteria:

(i) Needlestick or sharps injury to a railroad employee;

(ii) Medical removal of a railroad employee;

(iii) Occupational hearing loss of a railroad employee;

(iv) Occupational tuberculosis of a railroad employee; or

(v) Musculoskeletal disorder of a railroad employee that is independently reportable under one or more of the general reporting criteria.

* * * * *

7. In section 225.21, a new paragraph (j) is added to read as follows:

§ 225.21 Forms.

* * * * *

(j) Form FRA 6180.107—*Alternative Record for Illnesses Claimed to Be Work-Related.* (1) Form FRA F 6180.107 shall be used by the railroads to record each illness claimed to be work-related that is reported to the railroad—

(i) For which there is insufficient information to determine whether the illness is work-related;

(ii) For which the railroad has made a preliminary determination that the illness is not work-related; or

(iii) For which the railroad has made a final determination that the illness is not work-related.

(2) For any case determined to be reportable, the designation ''illness claimed to be work-related'' shall be removed, and the record shall be transferred to the reporting officer for retention and reporting in the normal manner.

(3) In the event the narrative block (similar to Form FRA F 6180.98, block 39) indicates that the case is not reportable, the explanation contained on that block shall record the reasons the railroad determined that the case is not reportable, making reference to the most authoritative information relied upon.

(4) Although the Form FRA F 6180.107 may not include all supporting documentation, such as medical records, the Form FRA F 6180.107 shall note the name, title, and address of the custodian of those documents and where the supporting documents are located so that it is readily accessible to FRA upon request.

8. In section 225.23, paragraph (a) is revised to read as follows:

§ 225.23 Joint operations.

(a) Any reportable death, injury, or illness of an employee arising from an accident/incident involving joint operations must be reported on Form FRA F 6180.55a by the employing railroad.

* * * * *

9. Section 225.25 is amended by revising paragraphs (b)(6), (b)(16), (b)(25)(v), (e)(8), (e)(24), (h)(15), and new paragraphs (b)(25)(xi), (b)(25)(xii) and (i) are added to read as follows:

§ 225.25 Recordkeeping.

* * * * *

(b) * * *

(6) Employee identification number or, in the alternative, Social Security Number of railroad employee;

* * * * *

(16) Whether employee was on premises when injury, illness, or condition occurred;

* * * * *

(25) * * *

(v) If one or more days away from work, provide the number of days away and the beginning date;

* * * * *

(xi) Significant injury or illness of a railroad employee;

(xii) Needlestick or sharps injury to a railroad employee, medical removal of a railroad employee, occupational hearing loss of a railroad employee, occupational tuberculosis of a railroad employee, or musculoskeletal disorder of a railroad employee which musculoskeletal disorder is reportable under one or more of the general reporting criteria.

* * * * *

(e) * * *

(8) County and nearest city or town;

* * * * *

(24) Persons injured, persons killed, and employees with an occupational illness, broken down into the following classifications: worker on duty—employee; employee not on duty; passenger on train; nontrespasser-on railroad property; trespasser; worker on duty—contractor; contractor—other; worker on duty—volunteer; volunteer—other; and nontrespasser-off railroad property;

* * * * *

(h) * * *

(15) The railroad is permitted not to post information on an occupational injury or illness that is a privacy concern case.

* * * * *

(i) *Claimed occupational illnesses.* (1) Each railroad shall maintain either the Form FRA F 6180.107, to the extent that the information is reasonably available, or an alternate railroad-designed record containing the same information as called for on the Form FRA F 6180.107, to the extent that the information is reasonably available, for each illness claimed to be work-related—

(i) For which there is insufficient information to determine whether the illness is work-related;

(ii) For which the railroad has made a preliminary determination that the illness is not work-related; or

(iii) For which the railroad has made a final determination that the illness is not work-related.

(2) For any case determined to be reportable, the designation ''illness claimed to be work-related'' shall be removed, and the record shall be transferred to the reporting officer for retention and reporting in the normal manner.

(3) In the event the narrative block (similar to Form FRA F 6180.98, block 39) indicates that the case is not reportable, the explanation contained on that block shall record the reasons the railroad determined that the case is not reportable, making reference to the most authoritative information relied upon.

(4) In the event the railroad must amend the record with new or additional information, the railroad shall have up until December 1 of the next calendar year for reporting accidents/incidents to make the update.

(5) Although the Alternative Record for Illnesses Claimed to be Work-Related (or the alternate railroad-designed form) may not include all supporting documentation, such as medical records, the alternative record shall note the custodian of those documents and

where the supporting documents are located so that it is readily accessible to FRA upon request.

10. Section 225.33 is amended by adding new paragraph (a)(11) to read as follows:

§ 225.33 Internal Control Plans.

(a) * * *

(11) In the case of the Form FRA F 6180.107 or the alternate railroad-designed form, a statement that specifies the name, title, and address of the custodian of these records, all supporting documentation, such as medical records, and where the documents are located.

* * * * *

11. Section 225.35 is amended by designating the first paragraph as paragraph (a), designating the second paragraph as paragraph (b), and adding after the fourth sentence of newly designated paragraph (b) the following two sentences:

§ 225.35 Access to records and reports.

* * * * *

(b) * * * The Form FRA F 6180.107 or the alternate railroad-designed form need not be provided at any railroad establishment within 4 hours of a request. Rather, the Form FRA F 6180.107 or the alternate railroad-designed form must be provided upon request, within five business days, and may be kept at a central location, in either paper or electronic format. * * *

12. Section 225.39 is added to read as follows:

§ 225.39 FRA policy on covered data.

FRA will not include covered data (as defined in § 225.5) in its periodic summaries of data on the number of occupational injuries and illnesses.

PART 240—[AMENDED]

13. The authority citation for part 240 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20135, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

14. In section 240.117, paragraph (e)(2) is revised to read as follows:

§ 240.117 Criteria for consideration of operating rules compliance data.

* * * * *

(e) * * *

(2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.*, the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter (*i.e.*, employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead returned to work, for a work restriction that was not imposed, or for a non-prescription medication to be taken at prescription strength, whether or not the medication was taken), as instances of failure to adhere to this section;

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Issued in Washington, DC, on September 18, 2002.

Allan Rutter,

Federal Railroad Administrator.

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