

The Honorable John A. Hammerschmidt
Acting Chairman
National Transportation Safety Board
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594

Dear Mr. Chairman:

This is in response to National Transportation Safety Board's (Safety Board) former Acting Chairman Carol J. Carmody's letter concerning Safety Recommendations R-02-24, -25 and -26 which were addressed to the Federal Railroad Administration (FRA). These safety recommendations arose from the Safety Board's investigation of the November 15, 2001, head-on collision which occurred between two Canadian National/Illinois Central Railway trains near Clarksville, Michigan, resulting in the deaths of the two crew members of the northbound train and serious injuries to the crew members of the southbound train.

During your investigation, it was determined that the probable cause of the collision was attributable to "crewmembers' fatigue, which was primarily due to the engineer's untreated and the conductor's insufficiently treated obstructive sleep apnea." These crewmembers were on the southbound train and failed to comply with a stop signal indication thus, striking the northbound train and resulting in fatalities. Consequently, the following Safety Recommendations were issued to the FRA:

"Develop a standard medical examination form that includes questions regarding sleep problems and require that the form be used, pursuant to 49 Code of Federal Regulations Part 240, to determine the medical fitness of locomotive engineers; the form should also be available for use to determine the medical fitness of other employees in safety-sensitive positions." (R-02-24).

"Require that any medical condition that could incapacitate, or seriously impair the performance of an employee in a safety-sensitive position be reported to the railroad in a timely manner." (R-02-25).

"Require that, when a railroad becomes aware that an employee in a safety-sensitive position has a potentially incapacitating or performance-impairing medical condition, the railroad prohibit that employee from performing any safety-sensitive duties until the railroad's designated physician determines that the employee can continue to work safely in a safety-sensitive position. (R-02-26).

Introduction

We share the same concern and commitment expressed by the Safety Board that more stringent attention and awareness should be focused on the issue of medical conditions of employees and the possible resulting impairment of their performance. FRA, in partnerships with rail labor and management, seeks to pursue a comprehensive and proactive approach to safety. This approach includes the identification of fatigue-related problems and solutions thereto.

While we have made significant progress over the past years in understanding fatigue issues, we also recognize that significant efforts are still needed before conditions contributing to fatigue and lack of alertness are adequately addressed within the industry. Sleep-related disorders (obstructive sleep apnea, narcolepsy, and others) seriously impact the ability of employees to perform in a safe manner.

While we concur with the objectives of Recommendations 02-24, 25 and 26, we must also bear in mind considerations pertinent to their achievement. These considerations reflect three factors.

First, as illustrated by the terms of Recommendation R-02-26, the issue of sleep-related disorders is part of a larger complex of issues relating to medical standards for safety-sensitive employees. FRA's exercise of regulatory authority to directly address medical conditions or afflictions affecting employees' performance (fitness-to-work determinations) is presently limited to the provisions cited in the Code of Federal Regulations (CFR), Part 240.121, Criteria for Vision and Hearing Acuity Data and CFR Part 219, Control of Alcohol and Drug Use. When the Safety Board has raised this issue in the past, FRA has noted the presence of medical qualifications programs administered by the railroads, the significant effort that would be required to develop useful and acceptable Federal standards, and the priority then being accorded to regulatory and compliance initiatives with a greater potential for near-term reductions in railroad accidents and casualties.

FRA recognizes that significant time has passed since the Safety Board first presented this complex of issues through earlier recommendations, and FRA is pleased that much of the work toward development of regulations claiming higher priority has now been addressed. FRA also appreciates that the environment within which the railroads are addressing medical conditions continues to change, as the Americans with Disabilities Act is applied by employers and the courts. Further, advances in medical science offer greater opportunities for risk reduction today, and the advancing age of the rail employee population makes this issue increasingly important. At the same time, this remains a very demanding area of work for any regulatory agency and one that can consume substantial resources. If an agency elects to regulate in the field of medical standards, that agency must both apply expertise, to ensure it is effective, and invoke good judgment, to avoid denying employees the right to pursue their profession without a sound basis.

Second, it will not come as a surprise to the Safety Board that the long-standing opposition of rail labor and management to further Federal intervention in the area of medical standards and fitness-for-duty determinations continues to the present day. Although opposition is never a satisfactory excuse for failure

to act where the public interest requires action, the difficulty associated with this effort must be considered as an opportunity cost (potentially diverting resources from or disrupting other safety programs).

Third, as you know from your work with other transportation modes, it is extremely difficult to balance public- and employee-safety considerations, on the one hand, with individual expectations of privacy with respect to medical records and the policy of confidentiality between an employee and his/her physician, on the other. If possible, we should avoid requirements that threaten communication between the patient and health care professional so that persons are encouraged to seek evaluation, diagnosis and appropriate treatment. The issue of sleep-related disorders may be particularly sensitive to this concern, given the fact that most people appear to perceive that they are able to “work through” the effects of these disorders.

Issues Raised by Individual Recommendations

Considerations specific to the individual recommendations are discussed below.

Safety Recommendation R-02-24

Recommendation 02-24 calls for adoption of requirements for use of a medical examination form for locomotive engineers. The recommendation implies that standard medical (fitness) disqualification criteria would be applied using the information derived from the form, including criteria related to “sleep problems.” The form would be available for use, but would not be required to be used, for other employees in safety-sensitive service. Clearly, this recommendation is about much more than a standard form.

Safety Recommendation R-02-25

This recommendation would require that any medical condition that could incapacitate or impair the employee be reported to the railroad in a timely manner. Again, medical qualification standards are implied. The recommendation does not address who would conduct medical examinations, how disputes regarding medical findings would be resolved, how FRA would enforce reporting requirements on private health care providers, or whether self-reporting is intended.

Safety Recommendation R-02-26

This recommendation would require that a railroad remove the employee from service upon being notified that the employee has a “potentially incapacitating or performance-impairing condition” until the railroad’s own designated physician determines the employee can continue to work safely. Again, the recommendation must assume the presence of medical standards, or alternatively must assume that

enormous discretion will be conferred on the railroad-designated physician (discretion of the sort that FRA is unlikely to delegate in view of legal considerations).¹

General Discussion

FRA agrees that it is time for a fresh look at the issue of medical standards for safety-sensitive railroad employees. However, it is by no means clear what the outcome of that effort will be. The discussion that follows identifies issues that FRA will need to examine in order to determine an appropriate course of action.

The Safety Board cites examples of salutary efforts to address this issue in other modes of transportation. We do not currently have available literature that would reflect on the success of those efforts as they relate to sleep-related disorders. FRA appreciates the information provided by the Board and will seek to develop additional information to help guide our thinking.

The Safety Board raises this issue in the context of fatigue countermeasures. Management of fatigue encompasses a multitude of concerns in addition to those associated with medical conditions, e.g., work/rest scheduling, predictability, staffing, pay determinations, off-duty behavior, etc. Under the present tenets of public policy applicable to this area, the principal opportunities available to FRA for addressing fatigue involve cooperative efforts with the railroads and rail labor organizations. Regulatory efforts focused on mandatory reporting of medical conditions could seriously strain or even sever the bonds being formed in contexts such as the North American Rail Alertness Partnership and Safety Assurance and Compliance Programs.

If mandatory reporting of sleep-related disorders were to be required, it is not immediately obvious what the effect would be. The Safety Board has understandably focused on a case involving two employees with diagnosed problems that had not been properly managed. Undoubtedly there have been a number of previous accidents investigated by the Board where sleep-related disorders played a role, but no diagnosis had been made. So I am confident the Safety Board would not wish to discourage evaluation and diagnosis that might reduce the number of these events.

Under the current state of medical practice, sleep-related disorders are unlikely to be noted absent initiative by the patient to call out symptoms and request an evaluation. Ironically, perhaps the most effective local intervention that has come to FRA's attention in the railroad industry was a program commissioned by the railroad under which a third party assisted in the initial evaluation of employees who volunteered to participate. Employees who were referred for formal evaluation and care did so with the

¹As pointed out by the Safety Board's letter, there are a wide range of medical conditions that could "potentially" affect employee fitness, including uncontrolled diabetes, heart disease, and seizure disorders. Many prescription medications carry warning of a wide range of potential (if low probability) side effects that could be deleterious to the conduct of the employee's duties if realized.

confidence that the employer would not be advised of the results of the evaluation or the fact that they were in treatment. The effort resulted in the identification of a number of cases of sleep apnea, and employees expressed satisfaction that their treatment outcomes positively affected their lives. Many of the railroads' medical plans include coverage of sleep related conditions (including the use of Continuous Positive Airway Pressure devices), and the industry is actively making its employees aware of the coverages that are available. Should we be striving to achieve broader and more effective use of these approaches, which we believe are leading to positive results, or should we be relying on more directive approaches without knowing what the effects will be?

FRA Actions

Considerations such as those outlined above suggest the following strategies for responding to the concerns underlying the Safety Board's recommendations:

Short-term

FRA will continue to encourage and assist, as appropriate, the industry's efforts to educate its members on the issues associated with fatigue, including sleep problems.

FRA will issue a Safety Advisory highlighting the relationships between medical conditions (particularly sleep problems) and impaired performance. As a start, FRA will encourage employees to make their treating health care professionals aware of their safety-sensitive duties and to discuss potentially impairing conditions (including use of prescribed and over-the-counter medications) with those providers.

Mid-term

Subject to the availability of funding, FRA will contract for a comprehensive study of the issues attendant to issuance of requirements for medical qualifications programs. The study will determine the state of existing railroad qualification programs, survey Federal and State programs for potentially applicable models, identify applicable standards, estimate prospects for program effectiveness, determine resource requirements, evaluate the impact of required disclosure requirements on the decision to seek evaluation and treatment, and provide options for future action.

In order to determine the magnitude of benefits that might be claimed by action in this field, FRA will include in this study an element designed to obtain estimates of the prevalence of sleep disorders in railroad employees assigned safety-sensitive duties.

Long-term

Based upon the results of the study, and advice obtained through the Railroad Safety Advisory Committee, FRA will determine whether to issue proposed rules for medical standards, assist in the publication of recommended guidelines for industry, or take other appropriate action including education and awareness efforts.

Of course, we would welcome the opportunity to remain in conversation with the Safety Board and its staff regarding other actions we might undertake toward the same ends.

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It is requested that the Safety Board classify Recommendations R-02-24, -25, and -26 as “Open-Acceptable Response.” We will continue to advise the Safety Board on our progress in responding to these recommendations.

Sincerely,

Allan Rutter
Administrator

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bcc: RRS-1, 2, 3, 5 (Kaye), 10 (Pritchard, Taylor, Portsche, Misiaszek), 20

Retyped by Cblair, RPA-20, x36022, March 14, 03

RCC-1, 2, 10 (Smith, Kasminoff)

RDV-1, 2, 30, 32 (Orth, Raslear)

RRS-4/SKaye:493-6303:01/15/03editedbyGCothen2/14/03

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