



## Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters

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U.S. Department of Labor  
Occupational Safety and Health Administration  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: OSHA Safety and Health Program Management Guidelines, Docket No. OSHA-2015-0018**

### **Comments of the Brotherhood of Maintenance of Way Employes Division (BMWED/IBT)**

Brotherhood of Maintenance of Way Employes, a division of the International Brotherhood of Teamsters (“BMWED”), pursuant to the request of OSHA, hereby submits its public comments concerning OSHA’s November, 2015 draft of its *Safety and Health Program Management Guidelines*.<sup>1</sup>

BMWED is the recognized collective bargaining representative for 35,000 railroad maintenance of way employees who build, inspect, maintain, and repair railroad tracks, bridges, and related right-of-way infrastructure on all Class I railroads and several commuter and shortline railroads in the United States. As such, BMWED and its membership have a vested interest in OSHA’s efforts to improve worker safety and health through non-punitive, worker-centered programs focused on hazard recognition, hazard assessment, and hazard mitigation.

**Comment One:** OSHA’s draft at page 11 states:

Determine the severity and likelihood of incidents that could result from each hazard identified and use this information to prioritize corrective actions. Note, however, that employers have an ongoing obligation to control serious, recognized hazards.

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<sup>1</sup> These comments are not in order of the priority of issues.

Hazard identification, hazard assessment, and hazard mitigation are the cornerstones of an effective safety and health program. In the railroad industry, hazards receive scrutiny primarily when accidents/injuries occur. When accidents/injuries do occur, the rail industry reflexively blames the workers, and considers the matter closed by having disciplined or discharged the involved employee(s). On many railroad properties<sup>2</sup>, there is no systematic process in place for a pro-active, management supported, worker-involved process for hazard identification, hazard mitigation, and root cause analysis of accidents/injuries coupled with corrective action to prevent recurrence. Thus, the BMWED wholeheartedly supports OSHA's emphasis on worker participation and removal of barriers to worker participation in safety and health programs focused on hazard recognition and correction.

Traditionally, when a railroad worker suffers a reported<sup>3</sup> injury, the fact of the injury and its severity are used to discipline the worker. Because there were too many occasions in the railroad industry where the severity of an incident arising from a realized hazard was used to punish the worker in retaliation for being injured, it is important to qualify the guideline to caution railroads that its focus upon the severity of incidents will be considered retaliatory and in violation of FRSA §20109 where used for disciplinary purposes.

**Comment Two:** OSHA's draft at page 12 states:

Photograph or video-record problem areas to facilitate later discussion and brainstorming and for use as a learning aid.

There are serious disagreements between the railroads and rail labor unions over the ability of management to engage in video and audio recording of workers without having first negotiated the right to do so with the authorized representatives of rail workers. It is important for OSHA to add to its draft the following phrase: "If otherwise explicitly permitted by law or contractual agreement" before the word "photograph".

**Comment Three:** Accident Investigations

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<sup>2</sup> There are a few recent exceptions to this historical practice of "blame the worker" where enlightened railroad employers negotiated safety agreements with BMWED that promote joint root-cause analysis and corrective actions on a non-punitive basis. However, such negotiated agreements are the exception and not the rule.

<sup>3</sup> If the injured worker does not report the injury, it is likely he will not be disciplined.

OSHA's draft, pgs. 13-14, makes a solid effort to propose the proper scope of ideal post-incident investigations. However, OSHA's FRSA §20109 enforcement cases repeatedly document that many of the worst retaliatory practices of the nation's railroads occur during the course of such post-incident investigations. Accident investigations in the railroad industry are disciplinary in nature and focused almost entirely on blaming the worker. Investigation notices are served by the carrier on injured workers, compelling them to appear for an investigation to "ascertain your responsibility, if any, in the accident/incident which resulted in injury due to your possible violation of Carrier Rules [X & Y]." These carrier initiated and controlled "investigations" are punitive in nature, having a conviction rate of nearly 100 percent. As such, these "investigations" have a chilling effect on railroad employees' willingness to report accidents/injuries; and these "investigations" almost always result in discipline/discharge with no objective root-cause analysis component.

It is critical that the final Guidelines stress the prohibitions of retaliatory practices in the course of these post-incident investigations.<sup>4</sup>

**Comment Four:** OSHA's draft, p. 19, provides suggestions for best practices in training management to achieve these important goals. Among its guidelines is that management should:

Confirm, as part of the training, that all workers have the right to report injuries, incidents, hazards, and concerns and to fully participate in the program without fear of retaliation.

The BMWED does not believe that this language sufficiently conveys the critical importance of well-designed training to ensure that the culture of retaliatory practices in the railroad industry is ended. The proposed guideline would benefit from addition of the following language: "Railroad management industry training should include an explanation of the personal responsibility of rail managers under FRSA §20109 and FRA CFR 49 §209.303 for engaging in retaliation practices."

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<sup>4</sup> OSHA should note the potentially interrelated aspects of post-incident investigations in Federal Railroad Administration's relatively new regulations, 49 CFR § 272.1, *et. seq.*, 79 FR 16,218-35 (March 25, 2014) concerning *Critical Incident Stress Plans*.

**Comment Five:** The FRA 1978 Policy Statement on FRA/OSHA Jurisdiction is in critical need of upgrading.

While the issue of jurisdiction between the Federal Railroad Administration and OSHA is not a subject specifically addressed in the OSHA Safety and Health Program Management guidelines, BMWED would be remiss if it did not comment on the critical need for OSHA and FRA to jointly update the 1978 Policy Statement (Federal Register, Vol. 43, No 50, Tuesday, March 14, 1978, pgs. 10583-10590). The 1978 Policy Statement was written when both OSHA and FRA were in their infancy and each agency was attempting to ascertain its respective roles for assuring safety and health protection for rail workers, and the safety of rail operations, within the railroad industry.

Based on nearly 40 years of experience since the publication of the Policy Statement, the BMWED believes that it is paramount to the safety and health of railroad workers that FRA and OSHA revisit this matter and enter into a comprehensive MOU that clearly delineates and updates the jurisdictional framework so that each federal agency can concentrate its efforts in those areas in which it possesses the greatest experience and expertise. OSHA's extensive experience and expertise is concentrated in occupational safety and health. FRA's extensive experience and expertise is concentrated almost exclusively in the safety of railroad operations.

It is therefore critical for OSHA to have the leading role in protecting the occupational safety and health of railroad employees. Outside of the very strong presence of OSHA in the area of FRSA §20109 enforcement, OSHA's extensive safety and health experience and expertise is not being fully exercised in the railroad industry due to the still-unsettled issues discussed in the 1978 Policy Statement. BMWED believes the Policy Statement prophetically envisioned the necessity of revisiting the preliminary discussion on jurisdiction with the following statement:

“We believe the policy set forth in this document will assure that each of the principle Federal agencies charged with the responsibility for carrying out this program, that is, FRA and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, cooperative efforts between the two agencies should avoid the creation of regulatory gaps on the one hand, or the unnecessary duplication on the other.”  
(Emphasis added)

Thus, the BMWED encourages OSHA to initiate such a cooperative effort with FRA and enter into a comprehensive MOU bringing OSHA's extensive safety and health expertise and experience to bear for the protection of railroad workers from all occupational hazards not inherently related to the safety of railroad operations.

Conclusion: The BMWED applauds the genuine effort of Assistant Secretary Michaels and his diligent staff for making these improvements to the Guidelines. The BMWED encourages the modifications urged in these comments. As always, BMWED looks forward to assisting OSHA in its vital mission and answering any questions it may have concerning these comments.

Respectfully submitted,

A handwritten signature in black ink, reading "Freddie N. Simpson". The signature is written in a cursive style with a prominent initial "F".

President

cc: Rick Inclima, Director of Safety