TTD

A bold voice for transportation workers

July 8, 2016

Ms. Christine Hydock,
Chief of the Medical Programs Division,
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Dr. Bernard Arseneau,
Medical Director, Assurance and Compliance,
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Evaluation of Safety Sensitive Personnel for Moderate-to-Severe Obstructive Sleep Apnea
Advance Notice of Proposed Rulemaking
Docket No. FMCSA–2015–0419 and FRA–2015–0111
RIN 2126–AB88 and 2130–AC52

Dear Ms. Hydock and Dr. Arseneau,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I write to comment on FRA and FMCSA's joint Advanced Notice of Proposed Rulemaking (ANPRM) on evaluating certain safety-sensitive transportation workers for obstructive sleep apnea (OSA). By way of background, TTD consists of 32 affiliated unions representing workers in all modes of transportation, including those who FMCSA and FRA may consider safety-sensitive and would be impacted by this proceeding.[1] We therefore have a vested interest in this rulemaking.

TTD affiliates represent a wide range of workers who may be considered safety-sensitive for the purpose of an OSA regulation: from employees who operate trains and buses, to those who perform maintenance and construction, to those who ensure safety on railroads. TTD has long supported common sense changes to the regulations concerning physical qualifications with the goal of improving safety.

[1] Attached is a complete list of TTD' s 32 affiliated unions.

Transportation Trades Department, AFL-CIO

815 16th Street NW /4th Floor /Washington DC 20006
Tel:202.628.9262 / Fax:202.628.0391 /www.ttd.org
Edward Wytkind, President /Larry I. Willis, Secretary-Treasurer

In this ANPRM, the Agencies solicit comments on the possibility of promulgating a rulemaking concerning the evaluation of certain workers for OSA. The Agencies state that OSA is a respiratory disorder characterized by a reduction or cessation of breathing during sleep, which may result in drowsiness and lack of concentration.

This ANPRM specifically comes in response to efforts from both Agencies to consider how to approach transportation workers with this condition. In 2011, FMCSA tasked the Medical Review Board (MRB) and the Motor Carrier Safety Advisory Committee (MCSAC) to provide recommendations concerning OSA standards. In 2013, Congress passed H.R. 3095, which requires that any requirement providing for the screening, testing, or treatment of individuals operating commercial motor vehicles for sleep disorders be accomplished through a rulemaking. On the FRA side, in 2004 FRA issued Safety Advisory 2004-004 which contained recommendations to railroads on steps they could take to reduce risks associated with degraded performance from untreated or undiagnosed sleep conditions.

TTD supports FMCSA and FRA's efforts to use their authority under 49 U.S.C. 31136(a) and (b) and 49 U.S.C. 20103 respectively, to establish physical and medical qualifications to ensure that covered transportation workers are able to perform their jobs safely. We also appreciate the Agencies' position that OSA, if untreated, can result in and contribute to fatigue. However, we believe that there are several other factors that contribute to fatigue among transportation workers covered in this proceeding. Any effort to address OSA does not require a separate rulemaking process but instead may be included in other initiatives designed to reduce fatigue. Furthermore, any OSA rule must take steps to avoid burdening workers with excessive costs and protect them from being unfairly kept out of work. TTD expands on these concerns and other items in response to the questions posed in the ANPRM below.

Impact of OSA

In this ANPRM, aforementioned Agency reports, and other regulatory proceedings, the Agencies have correctly identified fatigue as a major issue facing certain transportation workers and a significant safety risk. In the types of professions that may be impacted by OSA regulation, long shifts and in some cases unpredictable scheduling can foster an environment in which an employee is unable to get enough sleep to operate at the highest level of performance.

However, we believe that OSA represents only a small fraction of the larger problem of risks relating to fatigue. For example, in a 2004 FRA study of Railroad Signalmen, the Agency found that 50% of Signalmen got less than seven hours of sleep per work night, substantially less sleep than the average American. Furthermore, 16% averaged less than six hours per night, a level of rest which FRA refers to as consistent sleep deprivation, and that has clear negative impacts on alertness resulting in performance degradation. Meanwhile, less than 6% of Signalmen reported having any kind of sleep condition, which includes but is not limited to sleep apnea. The findings

of this report demonstrate that multiple contributing factors caused workers' fatigue, not just sleep disorders, and that focusing solely on a single factor would ignore the other, more widespread causes, of fatigue. [2]

Additionally, the Transit Rail Advisory Committee for Safety (TRACS) produced a 2015 report on fatigue management plans for the bus and transit rail industry. TRACS does discuss OSA as a risk to be considered, but the Committee also proposes potential changes to hours of service regulations, implementing fatigue training requirements, conducting research on shift scheduling, and design standards that reduce fatigue as part of a holistic approach to the issue of fatigue as opposed to singling out OSA as an issue deserving of separate recognition.

Because of the multitude of factors that contribute to the much larger issue of fatigue, TTD strongly believes that regulating the evaluation of safety sensitive transportation workers for OSA is not a silver bullet to solving fatigue related problems among these employees, and encourages the Agencies to adopt an approach to the process more consistent with the holistic philosophy of the TRACS report.

Separate Rulemaking

Given the above, TTD believes that OSA does not rise to the level of requiring a separate rulemaking process. As laid out in the TRACS report, efforts to combat OSA should be accomplished in tandem with more large-scale efforts to tackle fatigue amongst transportation workers as a whole. For workers regulated under FRA, we believe that an appropriate vehicle may be the pending Risk Reduction Rulemaking, mandated by Section 20156 of the Rail Safety Improvement Act of 2008, which requires certain railroads to develop and implement a Risk Reduction Program. Section 20156(f) specifically requires that these programs include a fatigue management plan that is designed to reduce fatigue and safety risks. These programs may be an appropriate tool for addressing OSA. For workers under FMCSA, the Agency could take additional steps to enact NTSB Safety Recommendation H-12-029 which recommended that FMCSA establish an ongoing program to improve fatigue management programs implemented by motor carriers.

Cost

Through the ANPRM, the Agencies ask for information regarding the cost of treatment, and workers' share of out-of-pocket costs. In this regard, TTD expresses extreme concern over the financial burden placed on workers stemming from potential regulation that would require expensive OSA screenings and treatments. While the costs incurred will vary depending on health insurance plans or lack thereof, our affiliates have reported that that their members who are currently being screened for OSA at the behest of the carrier or railroad are facing out of pocket

[2] As an effect of changes made to FRA's Hours of Service regulations resulting from the enactment of the Rail Safety Improvement Act of 2008 (RSIA), the Brotherhood of Railroad Signalmen (BRS) have identified that changes to the length of work shifts and hours of rest have had a positive impact on reducing fatigue amongst Signalmen. By addressing multiple causes of fatigue, these changes have eliminated the complaints BRS has received related to fatigue.

costs most, if not all of the time. TTD affiliates have reported out of pocket costs ranging from several hundred dollars to over $3,000. These accounts are corroborated by a recent study by the American Transportation Research Institute which found that 53 percent of truck drivers referred for sleep studies paid out of pocket, with an average payment of $1,220 for the study alone. These exorbitant costs represent an impossible barrier to many transportation workers who are faced with the decision of paying for a screening or treatment that they may not be able to afford, or losing their job entirely.

We also note that cost incurred does not end with simply paying for the screening or treatment. TTD expresses concern that a potential rule may result in workers being pulled off duty after being flagged for certain OSA risk factors. In the interim between being flagged and diagnosis, workers have been pulled off the job while awaiting the test and results, a process that can take months. During this time, if removed from duty a worker may be forced to pay out of pocket for diagnosis and treatment from wages they are no longer receiving. This puts workers in an impossible, and unfair position, and the Agencies must ensure that no future regulation causes such an untenable burden.

Covered Workers

FMCSA and FRA also solicit information on the definition of safety-sensitive personnel for the purpose of determining which employees will be impacted by a potential regulation. Given the potential scope and cost of regulating OSA evaluations, we believe that the Agencies should consider a narrow definition. Safety-sensitive for the purposes of OSA evaluation should only include those employees for whom being subjected to a costly and time consuming process will clearly produce significantly increased safety results. If the Agencies move forward with a rule, we recommend that FMCSA and FRA consider only operating crews and operating employees as safety sensitive.

Further, the Agencies should give consideration to an employee's duties and the nature of their industry in making a safety-sensitive determination. In some professions, fatigue represents a minor issue, and subjecting these workers to OSA testing is unlikely to improve safety. For example, OSA testing may not be appropriate for split shift drivers, such as school bus drivers who have an opportunity to rest in-between shifts. It also may not be appropriate for workers whose primary responsibilities do not involve driving a CMV but who may operate a CMV for only a short period of time per day or per week. Finally, the agencies should also consider not including intra-state transit employees who generally do not experience the same fatigue risk factors seen in other sectors.

Including these types of workers in an OSA regulation represents a case of diminishing returns in which the rule may produce minimal if any improvements to safety while placing substantial burden on the individual worker. We also believe that a narrow view of the inclusion of some employees as safety-sensitive is consistent with FAA's existing model concerning OSA.

Screening and Treatment

The Agencies also ask several questions in regards to treatment and screening of OSA. TTD raises several issues in response.

Qualifications for Providers

If FMCSA and FRA pursue a sleep apnea regulation, the agencies should take steps to ensure that the potentially large population of workers required to undergo testing be steered towards credible doctors and facilities. We support FAA's approach (described further below) which allows any physician (including a primary care doctor) to perform an initial OSA evaluation, which may occur following the identification of OSA risk factors during a medical exam by an Aviation Medical Examiner. If the screening physician finds no evidence of OSA and no need for further evaluation, that ends the matter.

Where, however, evidence of OSA requires a referral for an in-laboratory sleep study, that diagnostic referral, interpretation and treatment must be done by a specialist certified by the American Academy of Sleep Medicine (AASM).

We, likewise support initial evaluations to be performed by any physician, but seek assurance that where OSA is actually diagnosed and treatment is required, that care will be done by a qualified specialist. The Agencies must ensure that an influx of workers seeking tests and treatment does not result in a cottage industry of exploitative healthcare providers of questionable or unclear quality, or unrelated expertise. To address this concern, the Agencies could mandate that healthcare professionals seeking to treat and diagnose transportation workers be accredited by the American Academy of Sleep Medicine (AASM) or another well-regarded medical organization.

Barriers to Treatment

We also note that not all workers have easy access to qualified sleep professionals. For those who live in rural areas, travel to a sleep specialist potentially multiple times for screening, treatment and follow-up appointments may require substantial commitment of time. FMCSA and FRA should bear in mind the impact on these type of individuals in considering an OSA regulation.

Risk Factors

Previous recommendations and current practice regarding the risk factors for OSA tend to include elements such as neck size, BMI and age. While TTD is not recommending the use of any particular factor or method at this time, we ask that if Agencies go forward with a rule which contains specific risk factors and criteria, that the Agencies make effort to base these factors on the most accurate, up to date medical information, and that they be formulated to avoid casting too wide of a net and incurring unnecessary screenings.

Process

As the ANPRM notes, FAA has recently addressed OSA among pilots. If the agencies proceed with a rule, we point to the FAA process as offering some guidelines for how FRA/FMCSA can address the issue. In the FAA system, a pilot with appropriate risk factors is referred for screening following a medical exam. If the screening physician, in his or her clinical judgment, finds it

appropriate, the worker is required to take a sleep test. During this period of time, a pilot is still able to fly, is not removed from work, and has a 90-day period to complete a sleep test. If a pilot is diagnosed with sleep apnea following an at-home test or a sleep study, only then are they prohibited from flying.

However, pilots are permitted to begin flying immediately while waiting for the processing of a special issuance medical certificate after they comply with treatment plans for at least seven days, submit documentation of such compliance, provide a personal affidavit of compliance, submit a physician's statement of successful treatment, provide their sleep study results, and file a request for a special issuance medical certificate. Upon receiving the special issuance medical certificate, pilots are certified to fly for a one-year period, after which compliance with OSA treatment is confirmed on an annual basis to maintain the certificate.

This model offers several important components that FRA/FMCSA should seek to include in any future regulations. First, as with the FAA system, it is essential that employees with OSA who are receiving treatment are able to continue working, and that an OSA diagnosis does not result in permanent medical disqualification if OSA is successfully treated. It is also critical that a potential regulation take care to ensure that, between the initial identification of OSA risk factors and the granting of a special issuance medical certificate, employees encounter minimal, if any, disruption to their work schedule. In a future regulation, we would also support the Agencies adopting FAA policy that permits the use of some home sleep tests in addition to lab sleep studies, as at-home tests are much cheaper and reduce the financial burden placed on the employee. It is noteworthy that this FAA protocol was developed after consultation with stakeholders and industry participants and outside the rulemaking process.

We also note that the FAA system shares some similarities with the recommendations made in the MCSAC/MRB report, which recommended that a driver may be conditionally certified for 60 days pending a sleep study. Within that window, if a driver is diagnosed with OSA and is compliant with treatment, the driver may receive an additional 90-day certification. If still compliant after 90 days, the driver may receive a conditional certification lasting one year, which may be renewed.

<u>Option for Treatment Alternatives</u>

Currently, the most popular option for treatment is the Continuous Positive Airway Pressure, or CPAP machine. While effective for many, some individuals with OSA are not able to tolerate the CPAP machine- in fact, a recent study by the Cleveland Clinic showed that only 42% of patients were using CPAP as recommended.[3] Any proposed regulation should allow those with OSA to try multiple treatment options, such as surgery, implants, and orthodontic devices in the case that CPAP is not effective or tolerable.

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[3] Russell, Jonathon; Gales, Jordan; Bae, Charles; Kominsky; Alan *"Referral Patterns and Positive Airway Pressure Adherence upon Diagnosis of Obstructive Sleep Apnea"*. Otolaryngology–Head and Neck Surgery, 2015.

TTD appreciates the Agencies efforts to ensure that their physical qualification standards ensure that employees in safety sensitive positions are able to their jobs to the highest standard. We also understand that OSA may be a contributing factor to fatigue. However, TTD strongly cautions the Agencies against pursuing a rulemaking that is unduly burdensome on workers and threatens their livelihood. If the Agencies determine that OSA must be addressed, we encourage FMCSA and FRA to look at other vehicles in current and pending regulation through which sleep apnea may be addressed holistically as part of the much larger problem of fatigue, as opposed to through a separate rulemaking process.

We appreciate the opportunity to comment on FMCSA and FRA's ANPRM on evaluating safety sensitive personnel for moderate to severe sleep apnea, and we look forward to working with the Agencies on future efforts to improve safety.

Sincerely,

Edward Wytkind
President

Transportation Trades Department, AFL-CIO
A bold voice for transportation workers

TTD MEMBER UNIONS

Air Line Pilots Association **(ALPA)**
Amalgamated Transit Union **(ATU)**
American Federation of Government Employees **(AFGE)**
American Federation of State, County and Municipal Employees **(AFSCME)**
American Federation of Teachers **(AFT)**
Association of Flight Attendants-CWA **(AFA-CWA)**
American Train Dispatchers Association **(ATDA)**
Brotherhood of Railroad Signalmen **(BRS)**
Communications Workers of America **(CWA)**
International Association of Fire Fighters **(IAFF)**
International Association of Machinists and Aerospace Workers **(IAM)**
International Brotherhood of Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers **(IBB)**
International Brotherhood of Electrical Workers **(IBEW)**
International Longshoremen's Association **(ILA)**
International Organization of Masters, Mates & Pilots, ILA **(MM&P)**
International Union of Operating Engineers **(IUOE)**
Laborers' International Union of North America **(LIUNA)**
Marine Engineers' Beneficial Association **(MEBA)**
National Air Traffic Controllers Association **(NATCA)**
National Association of Letter Carriers **(NALC)**
National Conference of Firemen and Oilers, SEIU **(NCFO, SEIU)**
National Federation of Public and Private Employees **(NFOPAPE)**
Office and Professional Employees International Union **(OPEIU)**
Professional Aviation Safety Specialists **(PASS)**
Sailors' Union of the Pacific **(SUP)**
Sheet Metal, Air, Rail and Transportation Workers **(SMART)**
SMART-Transportation Division
Transportation Communications Union/ IAM **(TCU)**
Transport Workers Union of America **(TWU)**
UNITE HERE!
United Mine Workers of America **(UMWA)**
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union **(USW)**

These 32 labor organizations are members of and represented by the TTD