

CHAPTER 14¹

RESTRICTING PERSONAL ELECTRONIC DEVICES IN THE RAILROAD INDUSTRY

Concerns about the potential distraction of cell phones and other personal electronic devices have led to the introduction of rules that restrict or prohibit their use by employees on North American railroads. In this session, **M. David Vaughn**, an experienced rail industry arbitrator, discussed the arbitral approach and the kinds of cases that are emerging under this new regime. **Michael Long** of the Federal Railroad Administration explained the reasons for the rules and how they are applied. **Elizabeth C. Wesman**, National Academy of Arbitrators, Camas, WA, moderated the panel discussion. The following paper addresses the topics that were discussed by the panel and audience members.

RESTRICTIONS ON THE USE OF PERSONAL ELECTRONIC DEVICES IN THE RAILROAD INDUSTRY

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Introduction³

This paper reviews the events that triggered Federal Railroad Administration (FRA) Emergency Order 26 (E.O. 26) and regulatory regimes and policies promulgated by other government agencies and carriers that restrict the use of cell phones and other personal electronic devices (PEDs)⁴ on railroads and mass transit.

¹Dedicated to the memory of Herb Marx.

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⁴As defined in E.O. 26, PEDs include such devices as DVD players, radio receivers, and audio players in addition to cell phones.

In addition, it addresses the few arbitration awards that have been issued that apply the resulting regulations and policies. Finally, it considers both past and potential problems of evidence and proof in arbitration awards that involve cell phones and other PEDs and draws some preliminary conclusions regarding future arbitration cases.

Cell Phone and PED Usage

Cell phones are everywhere in our society, including the workplace. There is an average of one cell phone for every individual living in the United States—man, woman, and child;⁵ other PEDs are also prevalent. They have penetrated virtually every aspect of daily life, and their increasing proliferation has resulted in the imposition of restrictions or prohibitions on their use. For example, according to the National Highway Traffic Safety Administration (NHTSA), more than 3,000 persons died in traffic accidents in 2010 due to distraction-affected crashes.⁶ Many—perhaps most—involved talking, texting, reading, or gaming on PEDs. In response, the National Transportation Safety Board (NTSB) recommended a nationwide ban on driver use of cell phones and other PEDs while operating a vehicle.⁷ U.S. Secretary of Transportation Ray LaHood has pushed for bans on text messaging and urged people to put their cell phones in the glove compartment while driving. He has even suggested that cell phones carry warning labels because of the danger they pose when used by people who are driving.⁸ Similarly, educational institutions have restricted or prohibited their use by students. It is commonplace, although not universal, for K–12 school systems to prohibit altogether their use during school hours while on school property. At the post-

⁵Cecilia Kang, Number of Cellphones Exceeds U.S. Population: CTIA Trade Group, WASH. POST (Oct. 11, 2011), available at http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html.

⁶Press Release, National Highway Traffic Safety Administration, U.S. Transportation Secretary LaHood Announces Lowest Level of Annual Traffic Fatalities in More Than Six Decades, Press Release 21-11 (Dec. 8, 2011), available at <http://www.nhtsa.gov/About+NHTSA/Press+Releases/U.S.+Transportation+Secretary+LaHood+Announces+Lowest+Level+Of+Annual+Traffic+Fatalities+In+More+Than+Six+Decades>.

⁷Press Release, National Transportation Safety Board, No Call, No Text, No Update Behind the Wheel: NTSB Calls for Nationwide Ban on PEDs While Driving (Dec. 13, 2011), available at <http://www.nts.gov/news/2011/111213.html>.

⁸Michael D. Bolden, NTSB Seeks Nationwide Ban on Driver Use of Personal Electronic Devices, WASH. POST (Dec. 13, 2011), available at http://www.washingtonpost.com/blogs/dr-gridlock/post/ntsb-seeks-nationwide-ban-on-driver-use-of-personal-electronic-devices/2011/12/13/gIQAekvBsO_blog.html.

secondary level, administrators have, for example, granted to instructors the authority to restrict and/or prohibit their use, including audio and/or visual recording, in class sessions.⁹

Railroad and mass transit employees also possess and use cell phones and other PEDs. However, many jobs in these industries are safety-critical—that is, positions whose performance is essential to safe operation—and the employees performing the duties of those positions must be constantly vigilant. Distractions can have—and have had—tragic consequences. The NTSB recommended in 2003 that the FRA address the issue. However, as of September 2008, there was no federal regulation prohibiting cell phone use by train crews. To be sure, many employers restricted the use of electronic devices by on-duty employees even prior to the use of cell phones, but policies were not uniform and enforcement was uneven.

Events That Triggered Promulgation of the Regulatory Regime

In 2008, the FRA concluded that distracting electronic devices posed a danger to rail transportation safety. The immediate event that gave rise to that conclusion was a September 12, 2008, incident in Chatsworth, California, in which a westbound Metrolink commuter train carrying 222 people ran through a red signal before entering a section of single track where an opposing eastbound Union Pacific freight train had been given the right of way by the train dispatcher. The commuter train collided head-on with the freight train, killing 25 people (including the Metrolink engineer) and injuring 135 others, 46 of them critically. The NTSB faulted the Metrolink engineer for the collision, concluding that he was distracted by text messages he was sending while on duty, the last of which he sent 22 seconds before impact.¹⁰

The FRA identified a number of additional examples involving cell phone use and distracted behavior between 2000 and 2008.¹¹ These included a 2008 incident in Houston, Texas, where a Union Pacific brakeman, who was talking on his cell phone at the time

⁹University of Minnesota, Administrative Policy on the Use of Personal Electronic Devices in the Classroom (last updated December 2009), *available at* <http://policy.umn.edu/Policies/Education/Education/CLASSROOMPED.html>.

¹⁰Various sources, including National Transportation Safety Board, Railroad Accident Report, Collision of Metrolink Train 111 With Union Pacific Train LOF65-12, Chatsworth, California, September 12, 2008, NTSB/RAR-10-01 (Jan. 21, 2010).

¹¹73 Fed. Reg. 58,704 (Oct. 7, 2008) (FRA E.O. 26, Notice 1).

of the accident, was struck and killed by the train to which he was assigned after instructing the engineer via radio to back up the train;¹² a 2005 incident at Copeville, Texas, where a contractor working on the property of the Kansas City Southern Railway Co. was struck and killed when, while talking on a cell phone, he stepped into the path of an approaching freight train; and a 2004 incident near Gunter, Texas, where a locomotive engineer died and a conductor suffered serious burns when two BNSF freight trains collided head-on, resulting in the derailment of five locomotives and 28 cars and damages estimated at \$2.6 million. NTSB investigators determined that, between 1:50 p.m. and 5:46 p.m., five crewmembers on both trains made and/or received 22 personal cell phone calls while the trains were in motion (a violation of BNSF rules).¹³

Regulatory Regime

At the national level, rail transportation in the United States is overseen by the FRA, an agency created in 1966 as part of the Department of Transportation (DOT). In E.O. 26, dated October 1, 2008,¹⁴ the FRA set forth prohibitions and restrictions that applied to on-duty railroad operating employees' use of cellular telephones and other electronic and electrical devices, defined to include DVD players, radio receivers, and audio players,¹⁵ capable of distracting them from safety-critical duties. The prohibitions and restrictions applied to operating employees¹⁶ while in the cab of a moving locomotive, while on the ground in proximity to live track, and while another employee of the railroad would be assisting in preparation of the train (e.g., during air brake tests).

E.O. 26 required that personal cell phones and PEDs be turned off and earpieces removed from the ear during times the employees would be engaged in covered activities. In addition, E.O. 26 prohibited locomotive engineers from using railroad-supplied cell phones/PEDs. In general, it permitted other operating employees

¹²See Federal Railroad Administration, Employee on Duty Fatality Investigation Assignments January–December, 2008.

¹³See National Transportation Safety Board, Railroad Accident Report, Collision Between Two BNSF Railway Company Freight Trains Near Gunter, Texas, May 19, 2004, NTSB-RAR-06/02 (June 13, 2006).

¹⁴73 Fed. Reg. 58,702 (Oct. 7, 2008).

¹⁵*Id.* at 58,707.

¹⁶Operating employees are those, as the term suggests, who are engaged in the operation of trains. Such crafts include engineers, trainmen, conductors, and brakemen.

to use railroad-supplied cell phones/PEDs in the cab of a moving locomotive for an authorized business purpose and within the body of a passenger car or railroad business car. However, it prohibited freight train crewmembers outside the cab from using such devices, even for an approved business purpose, unless the employee was not fouling a track, switching operations were not under way, other safety duties were not required, and members of the crew had been briefed that operations were suspended.

E.O. 26 did not restrict the use of railroad radios or affect the use of working wireless communications under 49 C.F.R. Part 220, which sets forth minimum requirements governing their use, and it established certain exceptions to the general prohibitions and restrictions. For example, employees were permitted to refer to a digital timepiece to ascertain the time of day or to verify the accuracy of speed indicators; operating employees were permitted to use the digital storage and display function of a personal or railroad-supplied cell phone/PED to refer to a railroad rule, special instruction, timetable, or other directive, *if* such use was authorized under the railroad's operating rules or instructions; and locomotive engineers were permitted to use electronic control systems and informational displays within the locomotive cab or on a remote control transmitter to operate a train or conduct switching operations.

Finally, E.O. 26 required that each railroad "instruct each of its railroad operating employees and supervisors of railroad operating employees concerning the requirements" of the order and "implementing railroad rules and instructions." It provided for sanctions, including civil penalties for individuals and/or the railroad; removal of individuals from safety-sensitive service if a violation demonstrated "unfitness"; and injunctive relief. By petition to the FRA's Associate Administrator for Safety, a railroad "may obtain relief from [E.O. 26] by adopting other means of ensuring that railroad operating employees are not distracted from their duties by use of [cell phones/PEDs] or by implementing technology that will prevent inappropriate acts and omissions from resulting in injury to persons."

In November 2008, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers and Trainmen (BLET) (collectively, the Unions) jointly filed a Petition for Review of E.O. 26; in December 2008, the Association of American Railroads (AAR) responded to the Unions' Petition. The Unions' four main concerns about E.O. 26 were that it (1) did

not exempt deadheading employees who were in the body of a passenger car or railroad business car, or inside the cab of a locomotive that was not the train's lead locomotive; (2) prohibited employees from taking pictures or video of safety hazards with electronic cameras; (3) prohibited the use of calculators; and (4) prohibited the use of personal global positioning system (GPS) tracking devices, even to verify the accuracy of a speed indicator in the controlling locomotive.¹⁷ The AAR contended, in response, that the Unions' suggested changes to E.O. 26 were unnecessary, could permit distractions, and would make the Order "difficult, if not impossible" to enforce.

The FRA published a Notice of Proposed Rulemaking regarding the use of electronic devices in May 2010, largely codifying E.O. 26 into 49 C.F.R. Part 220.¹⁸ In response to the labor organizations' concerns, the proposed rule only required deadheading employees within the cab of the controlling locomotive to have electronic devices turned off when the train was moving or in other situations in which crewmembers responsible for operating the train needed to focus;¹⁹ allowed the use of cameras, including stand-alone devices, to document safety issues; prohibited locomotive engineers from taking pictures in the cab of the controlling locomotive of a moving train;²⁰ and allowed calculators so long as they were used for an authorized business purpose and did not interfere with an employee's performance of safety-related duties, but prohibited use of the calculator function of a cell phone or electronic timepiece.²¹ It maintained the prohibition against personal GPS devices.²²

In addition to consideration of the Unions' concerns, the FRA also determined that E.O. 26, in some instances, covered more situations and devices than was "intended or desired." As a result, the FRA proposed to exempt devices that "enhance an ability to perform safety-related tasks, such as hearing aids and other devices that protect an employee's health and well-being," and for operating employees to use railroad-supplied or railroad-authorized devices for train movements, recognizing that many small railroads use cell phones or similar devices instead of a working

¹⁷75 Fed. Reg. 27,677 (May 18, 2010) (FRA Notice of Proposed Rulemaking).

¹⁸*Id.* at 27,672-90.

¹⁹*Id.* at 27,677.

²⁰*Id.* at 27,677-78.

²¹*Id.* at 27,678.

²²*Id.*

radio. The proposed regulations did not specifically direct carriers to discipline employees for violating the restrictions, but the FRA did posit a new penalty that would make violations of the rules the basis for revoking a locomotive engineer's certification. However, rather than including the proposal, the FRA merely invited comments on the idea.²³

On September 27, 2010, the FRA issued its final rule regarding the use of electronic devices by railroad operating employees, as provided in 49 C.F.R. Part 220.²⁴ In the final rule, the FRA made a handful of substantive changes from the earlier proposed rule, including a new exception that allowed railroad-supplied multifunctional devices to be used as cameras and that eliminated references to the use of video to document safety hazards. However, it recommended that no exception be made for personal emergencies, noting that employees found with a cell phone turned on while the train was moving could easily say that the phone was on because of a sick family member or other exigent situation. The FRA postponed a final decision on revocation of a locomotive engineer's certification as a possible penalty. The FRA noted that, for its purposes, access to employees' personal cell phone records was unnecessary. Finally, the FRA pointed out that 49 C.F.R. Part 220 provided minimum standards and that railroads were free to impose more restrictions.

Section 220.313 (Instruction)²⁵ required that, by December 27, 2010, "each railroad shall maintain a written program of instruction and examination of each railroad operating employee and each supervisor of a railroad operating employee on the meaning and application of the railroad's operating rules implementing [these] requirements."²⁶ The final rule became effective March 28, 2011, the date by which employees subject to the rules must have been instructed on them.²⁷

After the Chatsworth incident, various authorities, in addition to the FRA, urged or required the entities under their dominion to respond to the issues raised by cell phone/PED usage. At the federal level, for example, the new administrator of the Federal Transit Administration (FTA), which provides financial and

²³ *Id.*

²⁴ 75 Fed. Reg. 59,580–604 (Sept. 27, 2010) (final rule; rescission of E.O. 26).

²⁵ 49 C.F.R. §220.313.

²⁶ *Id.* §220.313(a).

²⁷ *Id.* §220.313(b).

technical assistance to local public transit systems,²⁸ specifically cited the Chatsworth Metrolink incident and urged each of the properties subject to its jurisdiction “to closely review your policies, procedures, and enforcement mechanisms targeting the inappropriate use of cell phones and other personal electronic devices by safety critical personnel.”²⁹ State and local jurisdictions also adopted rules and regulations to deal with on-the-job cell phone and PED usage.³⁰

Similar regulations were promulgated by Transport Canada, a department within the Canadian national government that is responsible for policies and programs related to all Canadian air, marine, road, and rail transportation. General Rule A of the Canadian Railway Operating Rules (CROR),³¹ which were adopted in March 2008 and govern all train operations in Canada, includes rules prohibiting use of personal communication devices for any purpose that is not work-related. Effective November 2008, Trans-

²⁸Public transportation includes buses, subways, light rail, commuter rail, etc. Until 1991, FTA was known as the Urban Mass Transit Administration.

²⁹Letter from Peter M. Rogoff, Federal Transit Administration Administrator, to “Colleagues” (June 26, 2009), available at www.fta.dot.gov/documents/Dear_Colleague_ltr_6-26.pdf.

³⁰For example, on September 18, 2008, just six days after the Chatsworth Metrolink incident, the California Public Utilities Commission (CPUC) adopted an interim emergency order prohibiting the personal use of cell phones and other PEDs by railroad and rail transit crew members. On October 6, 2011, the CPUC adopted General Order 172, noting that it was prompted by the Chatsworth incident. General Order 172 prohibited the use of PEDs by rail transit system operators and provided for the installation of continuously recording video cameras focused on operators in rail transit vehicle cabs. CPUC, Rulemaking 08-10-007, Decision Adopting General Order Governing the Use of Personal Electronic Devices.

In May 2009, the Massachusetts Bay Transportation Authority (MBTA) proposed to prohibit MBTA trolley and train operators and bus drivers from possessing a cell phone while working. *T to Ban Workers’ Phone Use on the Job*, BOSTON GLOBE (May 10, 2009). Ten days later, the Massachusetts Department of Public Utilities, which is responsible for oversight of the safety and security practices of the MBTA, issued emergency regulations, which became official in July 2009, prohibiting the use of cell phones and PEDs by on-the-job MBTA vehicle operators. Executive Office of Energy and Environmental Affairs Press Releases, dated May 19 and July 23, 2009. And in June 2009, the MBTA extended its policy to its contractors, including Mass Bay Commuter Rail, The Ride, and various commuter boat services and private bus companies. Massachusetts Bay Transportation Authority, Cell Phone Ban Expanded (June 7, 2009), available at www.mbta.com/about_the_mbta/news_events/?id=17461.

The Greater Cleveland Regional Transit Authority (RTA), following an August 2009 decision by prosecutors to charge an RTA bus driver with aggravated vehicular homicide (in March 2009, the RTA driver struck and killed a pedestrian in a crosswalk while the driver was on her cell phone), prohibited its operators, effective September 18, 2009, from having cell phones and PEDs on their person while they operated a bus or train. Press Release, Greater Cleveland Regional Transit Authority, RTA Strengthens Cell Phone Policy (Sept. 18, 2009), available at www.riderta.com/newsroom/releases?print=1&listingid=1345.

³¹Transport Canada, Canadian Rail Operating Rules, TC O-0-93 (Feb. 26, 2008, rev. Mar. 19, 2008), available at <http://www.tc.gc.ca/eng/railsafety/rules-tco93.htm>.

port Canada issued revised System Special Instructions (SSI) to CROR General Rule A(xii) that prohibit employees controlling an engine or track unit from using devices “when in motion” or “when any employee is on the equipment or track unit, outside the cab, or on the ground for related work activities.”³² However, it permitted other employees to use devices inside the cab while in motion, “after all crew members or operator of the track unit agrees it is safe to do so,” and outside the cab if the employee is not foul of a track, not engaged in physical work-related activities, and “all crew members or operator of the track unit confirm that operation will remain suspended until advised otherwise.”³³ The SSI permits either personal or railway-provided cell phones to be used during emergencies or in lieu of a radio during radio failure.³⁴

Application of the FRA Rules

General Principles

It is undisputed that employers—“carriers” in the parlance of the railroad industry—have the right to promulgate and enforce policies that affect the operation and property of the workplace and the activities of the workforce. In the absence of a collective bargaining relationship or governmental regulation, these rights may be exercised unilaterally by management. Under a collective bargaining agreement, decisions by management that affect the covered workforce may be questioned by the union and may be subject to a grievance procedure that may ultimately lead to arbitration.³⁵ Even when workers are represented by a union, management generally has the right to promulgate reasonable rules, including the right to create and provide a safe workplace. Such rights are subject to bargaining, and carrier rules may not be inconsistent with governing agreements. The railroad industry is

³²Cited in Canadian Pac. Ry. Co. & Teamsters Canada Rail Conference, Canadian Railway Office of Arbitration & Dispute Resolution Case No. 3900 (2010), at 10–11 (Picher, Arb.).

³³*Id.* at 11.

³⁴Transportation Safety Board of Canada, Railway Investigation Report R10V0038, at 13–14; Canadian Pac. Ry. Co. & Teamsters Canada Rail Conference, Case No. 3900 (2010), at 10–11 (Picher, Arb.).

³⁵See Gladys W. Gruenberg, *Management and Union Rights: Overview*, in NATIONAL ACADEMY OF ARBITRATORS, *THE COMMON LAW OF THE WORKPLACE: THE VIEW OF ARBITRATORS* §3.1 *et seq.* (Theodore J. St. Antoine ed., 2nd ed. 2005). See also ELKOURI & ELKOURI: *HOW ARBITRATION WORKS* 766–67, 771–72 (Alan Miles Rubin, ed., 6th ed. 2003).

also regulated by various government agencies, whose regulations and policies also govern and inform carrier policies and may override or supplement the governing agreement.

Management's right and obligation to provide a safe workplace must be balanced against its employees' rights. For example, an employer may issue work rules that penalize its employees' off-duty conduct if the employer can demonstrate a connection (i.e., nexus) between harmful off-duty misconduct and the employer's legitimate business interests (e.g., actual or potential damage to the employer's reputation or problems of interrelationship with other employees).³⁶ Similarly, employees may be required to disclose to management information that is reasonably necessary for the proper conduct of the business.³⁷

Employees enjoy only limited rights of personal privacy in the workplace.³⁸ Absent a state constitution or statute providing a right of privacy in private sector employment, employees have no constitutional or statutory protection against unreasonable searches and seizures. The propriety of an employer search may turn on the reasonableness of the employee's expectations of privacy. Arbitrators generally admit otherwise reliable evidence obtained by videotaped or closed-circuit television surveillance of employees. The critical issues are usually whether the employer unilaterally may install the monitoring system or, again, whether the employee had a reasonable expectation of privacy. Evidence is sometimes excluded when the employer's conduct is considered in some way unfair or in violation of fundamental concepts of fair treatment.³⁹ In public employment cases, arbitrators typically employ a balancing test that weighs the employee's expectation of privacy against management's need to have the information or to otherwise regulate the employee's behavior.⁴⁰

It is undisputed that employees are expected to perform work at the workplace and possessions and activities that impede that reasonable expectation may be regulated. Management wants to ensure that employees are made aware of and comply with

³⁶See Dennis R. Nolan, *Standards for Discipline and Discharge*, in NATIONAL ACADEMY OF ARBITRATORS, *supra* note 35, at §6.6; ELKOURI & ELKOURI, *supra* note 35, at 779–80.

³⁷ELKOURI & ELKOURI, *supra* note 35, at 1153–54. For example, a company's request that an employee disclose his unlisted phone number was upheld so that he could be contacted for necessary overtime assignments. *Id.* at 1154 (citing Wyandotte Chems. Corp., 52 LA 755, 758 (Seinsheimer, 1969)).

³⁸See John Kagel, *Practice and Procedure*, in NATIONAL ACADEMY OF ARBITRATORS, *supra* note 35, at §1.71.

³⁹*Id.* See also, e.g., ELKOURI & ELKOURI, *supra* note 35, at 399–401.

⁴⁰ELKOURI & ELKOURI, *supra* note 35, at 1155.

reasonable rules and regulations; employees and their representatives are concerned that management does not go beyond proper limits to observe them for such purposes.⁴¹ Thus, “reasonableness” guides decisions regarding the propriety of employer restrictions on employee conduct and possessions, and on inspections of employee personal items and lockers. Adequate notice that employees are subject to such inspections and a reasonable basis for which to conduct them are necessary conditions.⁴² Where management had problems with thefts or where it had other reasonable cause, a rule or practice requiring employees to submit purses, briefcases, or lockers for inspection was upheld.⁴³ Similarly, although a company had a past practice of opening a toolbox either to remove tools needed for other employees or to protect against theft but had recently required employees to purchase their own locks, the employer could search toolboxes only if it had a reasonable basis for believing that a violation of a promulgated and published rule of conduct had occurred.⁴⁴

Failure to Negotiate Policies

In 2009, the Brotherhood of Locomotive Engineers and Trainmen (BLET) sued the Southern California Regional Rail Authority (SCRRA), which owns the Metrolink system, for failing to negotiate policies that allowed the installation of a digital video recorder system (LDVR) in Metrolink locomotives.⁴⁵ SCRRA, which contracts with Connex Railroad, LLC, for the provision of operating crews, including locomotive engineers, installed the LDVR system in locomotive cabs in October 2009 to deter employees from violating rules (necessarily including PED restrictions) while on duty. LDVRs are not, of course, themselves PEDs. Prior to installation of the LDVR system, the BLET sent SCRRA a letter objecting to its implementation. Because it did not have a bargaining relationship with the BLET, SCRRA did not respond to the letter—and did not meet, confer, or bargain with the BLET prior to implementing the LDVR system—instead referring the matter to Connex. SCRRA

⁴¹ *Id.* at 1157 (citing *FMC Corp.*, 46 LA 335, 338 (Mittenthal, 1966)).

⁴² *Id.* at 1161.

⁴³ *Id.* (citing *Pacific Southwest Airlines*, 87 LA 701, 706 (Rothschild, 1986)).

⁴⁴ *Id.* at 1162 (citing *Kawneer Co.*, 86 LA 297, 300–301 (Alexander, 1985)).

⁴⁵ *Brotherhood of Locomotive Eng'rs & Trainmen v. Southern Cal. Reg'l Rail Auth.* [i.e., Metrolink], No. CV 09-8286 PA (JEMx), 188 LRRM 3197 (C.D. Cal. 2010). The discussion on this case is based on two documents: SCRRA's Motion for Judgment on the Pleadings, and the Court's Decision, issued by U.S. District Judge Percy Anderson, granting the motion and dismissing the claim with prejudice.

delivered to Connex a copy of the “SCRRA Locomotive Digital Video Recorder System Policy and Procedures,” which contained procedures governing the preservation and disclosure of LDVR recordings, but never provided a copy to the BLET.

The BLET’s lawsuit against SCRRA alleged that the policy violated its substantive and procedural due process rights, that the LDVR and policy were preempted by FRA regulations, and that the organization was entitled to declaratory relief, stating that BLET members were entitled to engage in work to rule. (A cause of action under 42 U.S.C. §1983 had previously been dismissed.) The court dismissed the BLET’s case, stating with respect to the argument about failure to meet, confer, or bargain:

Plaintiffs complain that the Policy is facially invalid because it inherently deprives BLET members of their property without notice or an opportunity for hearing. Specifically, Plaintiffs claim the Policy allows disciplinary action for any “Incident.”... Plaintiffs also note that the LDVR recordings could potentially be used against BLET members in assessing civil penalties, in a criminal prosecution, or to disqualify BLET members from working on any railroads.

Contrary to Plaintiffs’ assertions, nowhere on the face of the Policy does it state that Defendant may terminate or otherwise discipline BLET members.... The Policy does state that recordings may be used for purposes of assisting with employee discipline or for testing compliance with Defendant’s operating rules. However, the fact that the LDVR recordings may be used in the course of disciplinary or termination proceedings does not change any notice or hearing requirements set forth by statute or through the BLET’s CBA with Connex.... Speculation that the LDVR recordings could possibly be used to terminate a BLET member without notice and a hearing is insufficient to establish that the LDVR policy is facially invalid.⁴⁶

This rather incomplete and anticlimactic ruling highlights concerns about the use of such video surveillance, including possible observation of the use of cell phones/PEDs and discipline based on such surveillance. In-cab surveillance devices are becoming more common. Whether unilaterally installed by management or bargained for, their potential use to establish violation of PED restrictions is obvious.

Discipline for Violating Policies

The basic principles of discipline apply to violations of the prohibitions on cell phone/PED use. Thus, an employer may

⁴⁶*Id.* at 3.

discipline an employee only for just cause and has the burden to prove that the employee committed the offense and that the penalty was appropriate to the violation. In carrying out discipline, the employer must afford employees due process.

There are, of course, some differences between discipline in the railroad industry and in other industries. Some railroad procedures apply on some commuter rail and mass transit systems and not others, depending on whether the property is covered by the Railway Labor Act (RLA) or some other statute. On almost all RLA-covered properties, the disciplinary process begins with charges, which are the subject of an evidentiary hearing held on the property before an official of the carrier, who runs the hearing and makes credibility determinations, makes findings and conclusions on the basis of which the carrier imposes a penalty. The hearing officer is obligated to provide a fair and impartial hearing, and the industry has made efforts to improve quality, but the use of part-time advocates to conduct hearings has limitations.

A National Railroad Adjustment Board (NRAB) Division or Public Law Board, consisting of one partisan member from each party and a neutral referee (arbitrator), hears any appeal of a case, receiving from the parties the notice of investigation, a transcript of the investigatory hearing (prepared by carrier personnel), the exhibits introduced at hearing, the carrier's disciplinary determination (which usually says merely that it has found the claimant guilty of particular rules violations and states the penalty imposed), the exchange of correspondence through the grievance process and written briefs containing the parties' respective versions of the facts, and arguments and citations of cases and authorities in support. The parties may present an oral summary of their arguments to the Division or Board. The proceeding is thus appellate; no new evidence or argument may be introduced at hearing. The neutral member then analyzes the written record and prepares a draft opinion and award, which is circulated for review by the partisan members. After discussion, sometimes vigorous, the award is signed and issued.

The standard of proof required to sustain discipline in railroad cases is substantial evidence considered on the record as a whole. As a general matter, carrier disciplinary determinations are afforded greater deference than in most non-railroad cases. Of particular significance, leniency is a prerogative of the carrier and not within the jurisdiction of the Division or Board.

Because the FRA's final rule regarding the use of electronic devices by railroad operating employees was developed with a sense of urgency uncommon in the administrative process used to develop and promulgate rules, it contains the elements, but few details, of the prohibition on PEDs. The final rule leaves to carriers some elements of how the rule is to be structured and promulgated in practice. In addition, although the final rule makes clear that the FRA considers possible violations to be a serious problem, it states nothing as to specific penalties for violation.

As a result, carriers have implemented the final rule in a variety of manners, although most have incorporated cell phone/PED violations into existing disciplinary structures and have generally classified violations as serious or dismissible for a first offense. Rules range from blanket prohibition on all possession as well as use of PEDs by employees while on duty to a rule permitting employees to carry PEDs with them in the off position and to use them under specified conditions—generally, when they are not performing safety-sensitive duties. I had experience with an example of the former rule—a blanket prohibition—at a transit agency. When asked what a bus operator was to do when urgent communication was required and no radio or other carrier-provided device was working, management responded that the operator should exit the bus, knock on the door of an adjacent house, and ask to use the phone. In certain situations, such a rule lacks common sense and, to ensure personal safety for employees, invites violations.

It is within this framework and against this background that discipline of railroad employees takes place for violations of cell phone/PED restrictions.

Because the FRA's final rule was so recently adopted, the case law involving its application is scant as of the date of submission of this paper. However, four cases, all sustaining dismissals for violations of carrier rules, have been identified. In one case, an engineer was dismissed for using a personal cell phone while operating a train, in violation of the carrier's rule requiring that cell phones be turned off while employees are on duty on a moving train.⁴⁷

⁴⁷Brotherhood of Locomotive Eng'rs & Trainmen & Norfolk S. Ry. Co., Special Board of Adjustment No. 1063, Award No. 825 (David Twomey, Chairman) (2010) (Twomey Award). The Board found the claimant's testimony—that he merely pulled out his phone when it vibrated in order to shut it off—not to be credible, especially in light of the train conductor's testimony that he pulled the emergency brake after he saw the claimant repeatedly texting while the train was moving. Given the claimant's record, which included a prior dismissal for passing a stop signal without authority and subsequent disciplinary handlings, the Board denied the claim.

In another case, a conductor, who had previously been reinstated after being involved in a major derailment for which he was determined to be responsible, was subsequently dismissed for using his cell phone to make six phone calls and to send or receive more than 90 text messages in the few hours prior to a derailment.⁴⁸ A third case involved a conductor who was observed by supervisory officials walking afoul of live tracks and lining a switch while all the time talking on his personal cell phone, thereby violating the carrier's prohibition against using cell phones.⁴⁹ The fourth case involved an engineer using a cell phone while performing a shove move and the rest of his crew was on the ground. Instead of stopping, the claimant shoved the train through a dirt/gravel pile at the end of the track and went through the wall of a grain milling company building.⁵⁰

A handful of cases involving Transport Canada's CROR rules have been decided by Arbitrator Michel G. Picher involving the Canadian Pacific Railway Company and Teamsters Canada Rail Conference. In a general case involving discipline, Arbitrator Picher held that a letter from the company's chief operating officer (COO) to the union that advised that employees in breach of its PED policy "will be dismissed" did not violate the collective

⁴⁸United Transp. Union & Norfolk S. Ry. Co., Public Law Board 7244, Award No. 98 (David N. Ray, Chairman) (2011) (Ray Award). At the time of the initial disciplinary action, the carrier was unaware of the claimant's use of his cell phone, only learning of it after the FRA subpoenaed his cell phone records and notified the carrier that he had violated E.O. 26. The Board, given the severity of the charges and the claimant's poor disciplinary record, sustained the dismissal.

⁴⁹United Transp. Union & BNSF, Public Law Board 7254, Award No. 46 (Robert E. Peterson, Chairman) (2012). The claimant conceded the supervisors' observations, but contended that he was using his cell phone for company business, that he did not endanger himself or his co-workers by doing so, and that the rule he allegedly violated contained exceptions for cell phone use. The Board concluded that employees were prohibited from using cell phones *at any time* while performing safety-sensitive duties (such as lining switches or fouling tracks), "even if communicating to other employees or crew members and operations are otherwise suspended by means of blue flag protection," and that the exceptions cited by the claimant only involved situations where employees were "not engaged in safety-related duties." The Board, citing the claimant's three prior actual suspensions and two record (paper only) suspensions, sustained the dismissal. It specifically noted that leniency was the prerogative of the carrier, not the Board.

⁵⁰United Transp. Union & Norfolk S. Ry. Co., Public Law Board 6602, Award No. 115 (Barry E. Simon, Chairman) (2012). The claimant conceded that, 20 minutes before the collision, he called his wife on his personal cell phone and that he did so while the rest of his crew was working on the ground. The Board noted that the incident occurred less than a month after the FRA's final rule became effective and the carrier revised its rule to require that "personal electronic devices, including earpieces, must be turned off and stored out of sight . . . by all train and engine service employees when any crew member is on the ground." The Board rejected the organization's claim that the claimant's use of his cell phone was covered by an exception to the rule for "minimal incidental use" and sustained his dismissal, noting its "reluctan[ce] to second-guess the Carrier when it determines that an employee's record reflects a risk-taking attitude."

bargaining agreement (CBA).⁵¹ In two specific disciplinary cases involving the Teamsters' Maintenance of Way Employees Division, Arbitrator Picher reduced the penalties imposed.⁵²

Problems of Evidence and Proof in Cell Phone/PED Cases

Observation of Alleged Violations

The FRA's regulations are recent and, as indicated, the number of awards applying policies based thereon remains small but will certainly grow. Even fewer awards provide insight as to the issues that may arise in enforcing the regulations and the inclinations of arbitrators in resolving them. For example, only the Twomey Award—where an engineer was observed by his conductor repeatedly texting while the train was moving—involved co-workers or others, such as customers, passengers, or contractors, who observed possible violations.

Cases that predate E.O. 26 provide such insight in other contexts involving observations and complaints by third parties, which may be useful by analogy. For example, with respect to railroad personnel who observed violations of cell phone/PED policies, a train operator in New Jersey—who, on one occasion, was observed using a cell phone as his train approached a station by an assistant supervisor and, on another, was observed with a cell phone to his

⁵¹Case No. 4039 (Sept. 15, 2011). The union, arguing that an automatic dismissal policy and practice is unreasonable, excessive, and contrary to the CBA and principles of progressive discipline, sought an order that the company cease and desist from automatically terminating employees for alleged breach of PED policy. Arbitrator Picher held that the company was entitled to determine the penalty it would apply for a given disciplinary infraction and to communicate the level of that penalty to its employees, finding that the COO's letter was merely putting employees on notice that the presumptive measure of discipline for a knowing and deliberate violation of the cell phone policy would be discharge. He noted, however, that any particular disciplinary action was still subject to just cause review (if that requirement is contained in the CBA) and the letter's mere promulgation of the policy does not violate the CBA.

⁵²In Case No. 4030 (July 1, 2011), where the grievant was dismissed for, among other things, "having a personal electronic device on his person while operating a tamper," Arbitrator Picher reinstated the grievant and imposed a suspension for the period between termination and reinstatement for the collision that he caused and for having been in possession of a PED while operating a tamper. In Case No. 4032 (Sept. 13, 2011), where the grievant was assessed 45 demerits for using his personal cell phone while on duty, he reduced the penalty to 30 demerits for a first offense, concluding that (1) 45 demerits is beyond the level of discipline sometimes assessed for serious cardinal rule violations; and (2) by moving an employee with a clear record halfway to the point of discharge, 30 demerits would be sufficient to correct his behavior while also putting other employees on notice that such conduct will be dealt with seriously.

ear by a company engineer—received a warning and a one-day suspension for the two incidents.⁵³

In another case, after implementation of E.O. 26 but prior to the effective date of the final rule, a carrier charged a claimant with a rule violation, based on an FRA inspector's citation of him for noncompliance with E.O. 26 and notification to his supervisor. It does not appear that the FRA directly disciplined the employee, but the citation prompted the carrier to initiate discipline against the employee. The Board denied the claim filed to protest the discipline, despite the fact that the FRA inspector did not participate in the investigative hearing.⁵⁴ I note in this regard that the FRA is apparently tasked to enforce the FRA rules directly by finding violations that may result in significant penalties to the railroad. However, the FRA has a practice of not allowing FRA inspectors to participate in investigative hearings, for which there appears to be no statutory or policy support. On the other hand, the practicalities of the industry are such that neither carriers nor labor organizations wish to irritate FRA inspectors, who can make life difficult for those who might seek to compel them to appear at such hearings.

Requests for Records

The FRA decided in the final rule *not* to take a position on access to employees' personal cell phone records, merely determining that, for its purposes, access to such records was unnecessary.

⁵³New Jersey Transit & Amalgamated Transit Union Local 819, Case No. 08-0241 (Richard J. Roth, Arb.) (May 14, 2009). In the first incident, the grievant's train proceeded through the station without stopping in a pedestrian crosswalk. In the second, the witness, who had retired by the time of the investigative hearing, testified that he was no more than 4–5 feet from the cab of the train and saw grievant through the cab window. He reported the incident to the person in charge of operations, who had him put his account in writing, a copy of which was introduced into evidence and was consistent with his testimony. The grievant denied that he had a cell phone or ever used one as described at the hearing. The parties acknowledged that the case rested on the credibility of the witnesses. Arbitrator Roth noted that grievant presented no evidence as to why either witness would lie as to what they had seen, pointing out that the witness to the second incident had retired. He concluded that grievant did not heed the earlier warning and that the one-day suspension for the second incident was reasonable.

⁵⁴Timber Rock R.R. (WATCO), NRAB First Division, Award No. 27440 (Lynette A. Ross, Board Neutral). Where the FRA inspector "observed Claimant playing a video game on his personal cell phone while a BNSF train went by on an adjacent track and Foreman . . . was on the ground waiting for the train to clear." The Board concluded that "Claimant was not on a break where the playing of video games might have been allowed; he was controlling the locomotive at the time of the observation." The Board noted its understanding "that it is not the practice of FRA personnel to appear at on-property disciplinary Investigations when the inspection forms and testimony by railroad personnel as to the circumstances are available for inclusion into the record."

Nonetheless, the FRA has subpoenaed employee cell phone records and transmitted that information to carriers. For instance, the Ray Award sustained the dismissal of an employee who had been reinstated after being involved in a major derailment but who was subsequently dismissed, based on information from the FRA, for using his cell phone for calls and text messages in the hours prior to the derailment.

In Canada, Arbitrator Picher has decided a number of cases involving requests for PED records. In a general case, the company advised the union that it intended to request that employees produce their PED records as a routine part of investigations into alleged incidents and/or accidents, and the union sought a cease and desist order. Arbitrator Picher denied the union's request, holding that the company's policy did not unduly violate employees' privacy rights or the CBA, noting that the company's request was at the core of its legitimate business interests and public obligations (i.e., pursuit of safe operations). He pointed out, however, that the policy "can only be properly applied if the request made of employees is confined to the period of their tour of duty in which there was a significant accident or incident" and not for 24-hour periods.⁵⁵ In a follow-up case, the union objected to the company's request for records "for the entire period of the tour of duty which is being investigated"; Arbitrator Picher found that the union misread his prior award, stating that the period of survey should be the period of their tour of duty *but nothing more*.⁵⁶ In a third case, an employee who declined to provide cell phone records for his tour of duty on a specific date, even after the investigator officer asked him if he understood that his refusal might

⁵⁵Canadian Pac. Ry. Co. & Teamsters Canada Rail Conference, Case No. 3900 (May 11, 2010). The union contended that the request was premature, improper, and violated employees' privacy rights as well as rights under the CBA, including the right to a fair and impartial investigation. The company noted that, under its policy, employees were at liberty to decline to provide the requested information and that their refusal only risked the employer drawing an adverse inference as to what the records might reveal, but *not* sufficient to support disciplinary action.

⁵⁶Canadian Pac. Ry. Co. & Teamsters Canada Rail Conference, Case No. 4038 (Sept. 15, 2011). Arbitrator Picher noted, however, that, in one case, the company "simply attempted to avail itself of private and personal communication data in the investigation of what it considered to be slow and inefficient production on the part of the conductor and his crew" (i.e., not the result of a serious accident or incident). That request was an "extraordinary intrusion" and not appropriate. In addition, that conductor was asked who he called, thereby contradicting the company's original claim (in Case No. 3900) that its "legitimate interest is in knowing when and where the communication devices were used in the context of investigating a significant accident or incident" and *not* in "detailed information surrounding the phone numbers called, or the contents of the text message," which could be blacked out. He remitted the case to the parties for their review and implementation based on his findings and declarations.

constitute insubordination, was assessed 45 demerits. Arbitrator Picher concluded that the grievant violated the cell phone policy while on duty but noted that other equivalent employees were entitled to use land line phones on their desks to make personal calls and reduced the discipline to 20 demerits.⁵⁷

Video Surveillance

There are numerous cases where a video surveillance system, generally management-installed, has been reviewed to determine whether an employee violated a company rule. One recent example is a grievant who reported that she had twisted her ankle the night before while disembarking her bus and that her ankle was sore, stating that she had not fallen but had “braced herself on the bus next to her.” After obtaining the camera system’s hard drive and watching one hour of video, the supervisor saw that there was an open stroller with a baby in it on the bus while the grievant was driving (a violation of company rules), saw the grievant’s cell phone light up for several seconds, and saw the grievant “step[] down off the bus with her right foot and then with her left foot... [with] no hesitancy in her movement, no twisting of her ankle and no bracing against a nearby bus.” The grievant’s discharge was upheld.⁵⁸

Other Issues

Numerous other issues of evidence and proof resulting from discipline for PED violations can be anticipated. For example, under carrier rules where an employee is prohibited from carrying a cell phone/PED on his or her person but the device may be carried in a handbag, proof as to whether the device was, in fact, on a

⁵⁷Canadian Pac. Ry. Co. & Teamsters Canada Rail Conference Rail Canada Traffic Controllers, Case No. 3944 (Oct. 14, 2010). Arbitrator Picher concluded that the fact that employees were allowed to make personal phone calls while on duty indicated that the company tolerated a certain degree of private conversation and undermined the gravity of the offense. He also concluded that the company’s investigation was neither abusive nor harassing, despite the investigative officer’s “obvious error” suggesting that the grievant’s refusal to provide his phone records might constitute insubordination.

⁵⁸Pace West Div. & Amalgamated Transit Union Local 241, Arb. No. 11/066 (Jan. 22, 2012) (Kenis, Arb.). After her alleged injury, the grievant went to the company’s doctor, completed an injury report, and, based on the doctor’s diagnosis, remained off work for a number of days. Arbitrator Kenis concluded, based on the surveillance video, that the grievant’s personal cell phone was lighted for several seconds while she was operating her bus. Although the grievant did not put the phone to her ear, press any buttons, or text, company policy required that personal cell phones be turned off while operating the bus. Arbitrator Kenis sustained the discharge, based on the two violations and her being untruthful about how, or if, she incurred an injury.

person, in their grip, or in a bag will be critical. Similarly, because some rules allow for personal cell phone use in emergency situations, determinations will no doubt be required as to whether the particular situation qualified as an emergency (or some other exception) that may have permitted, excused, or at least mitigated the use of a cell phone or PED.

Conclusions and Questions

There is limited hands-on experience by carriers and employees in administering the FRA rules and carrier policies that implement those rules to prohibit the use of cell phones and PEDs, as well as a dearth of cases interpreting their impact. That experience will grow quickly and there will emerge a body of case law to guide the parties and neutrals. Although relatively few doctrines have been established and many open questions persist with respect to these issues, certain principles have emerged and are likely to be applied in future cases. A few of them are presented here for consideration.

Likely Conclusions

- The FRA's regulations address legitimate issues of safety and efficiency, and policies that effectuate those regulations are enforceable, constitute major violations, and support penalties up to and including dismissal. The obligation to bargain with respect to PED policies and their impact creates difficult policy issues for the organization representing employees because of the obvious impacts on safety. Most bargaining initiatives by organizations seek to limit the use of surveillance devices to prove violations and to impose progressive discipline for at least some types of violations, rather than dismissal.
- The pervasive use of cell phones and PEDs in society creates a significant temptation for employees to violate the regulations and property-specific policies. For example, there has been resistance from the public on proposed bans on cell phone possession and use in vehicles, notwithstanding recommendations on restrictions or use by drivers of passenger cars. Only in government-regulated workplaces with special safety sensitivity—such as the railroad industry—have these bans been imposed. Penalties for first offenses have often been less than dismissal, notwithstanding acknowledgments by all

involved that PED violations constitute generous threats to safety.

- The practicalities of carrying and using cell phones, when other methods of communication do not work, make an absolute ban on possession and use of limited practicality and difficult to enforce. Some of the alternatives advanced in property-specific policies are less than practical and may make imposition of dismissal for first offenses difficult for employers to sustain.
- The circumstances surrounding the use of cell phones and PEDs in particular circumstances may cause arbitrators to mitigate penalties. Appealing excuses for cell phone use are likely; the credibility of stories of calls to sick children and other extenuating situations “requiring” the use of cell phones while at work will be tested.

Outstanding Questions

- May the carrier impose an absolute ban on the possession as well as the use of cell phones/PEDs? If a carrier allows such devices to be possessed and even used under some circumstances, how does the carrier articulate and enforce a ban under some circumstances and not others? Such partial permission/partial ban suggests both problems of evidence and proof and potential issues of disparate treatment between employees close to being similarly situated.
- May the carrier search employee lockers, bags, clothing, and persons for cell phones and PEDs? Cell phones and PEDs are small and easily concealed and may not be detected through casual observation, but only through “operations testing,” not only observing employee conduct but actively searching for such devices. Can such searches be conducted at random or will probable cause be required? How will the doctrine of reasonable expectation of privacy be applied to searches for such devices?
- May the carrier seize cell phones/PEDs found in an employee’s possession or used contrary to policy? May the carrier power up cell phones or other devices or require employees to do so in order to determine whether, when, and how they have been used?
- May the carrier require employees to produce or otherwise allow it to examine cell phone records and/or billing documents to confirm the time of use and/or the parties called/

texted? Are limitations appropriate as to time periods for which information is sought? Does that period change in the event of allegations of an ongoing practice of such use?

- If the carrier does not allow cell phones/PEDs, how does it realistically propose to handle situations where its own systems are inoperable or inadequate? (See the points raised in the previous section.)
- May the carrier prohibit the use of cell phones/PEDs for some purposes (e.g., to make personal calls while on duty) and allow and/or require their use for other purposes (e.g., to provide a method for contact with the carrier while on or subject to duty)? Again, fashioning and enforcing such policies will be difficult.
- How does arbitration address problems of proof such as lay observation by third parties (e.g., customers, members of the public)? Participation by outside witnesses cannot generally be compelled. In many industries the parties have a practice of not calling customers as witnesses but rather obtaining their versions of events through written statements or complaint forms. Moreover, the use of electronic surveillance will play an ever-increasing role in detecting and proving violations. Attempts to use such evidence will present its own problems of authorization, evidence, and proof.
- The “club in the closet” in dealing with use of cell phones and PEDs by locomotive engineers would be to make violations of the FRA regulations a basis to revoke or suspend their certifications, without which they cannot work in such a position. The FRA regulations invited comment on such possibilities. In 2012, the FRA extended certification requirements to conductors.⁵⁹ For engineers and other operating employees, a carrier-imposed penalty of disqualification or suspension from working in safety-sensitive positions as a consequence of a policy violation may be an adjunct to or substitute for traditional discipline.

⁵⁹77 Fed. Reg. 6482–92 (Feb. 8, 2012) (final rule; conductor certification). The FRA gave railroads until September 1, 2012, to grandfather as “certified conductors” all persons who were performing conductor duties as of January 1, 2012. After September 1, 2012, Class I and Class II railroads, as well as Amtrak and commuter railroads, must have designated and issued certificates to all persons authorized to perform as conductors between January 1 and December 1, 2012. After December 1, 2012, Class I and Class II railroads, as well as Amtrak and commuter railroads, may not initially certify or recertify a person as conductor unless that person has been tested and evaluated in accordance with FRA conductor certification rules. Testing and evaluation must be conducted under FRA-approved carrier certification programs.

- On a related topic, it should be noted that neither the FRA regulations nor a unilateral employer policy substitutes for whatever contractual just cause standard may exist. PED policies certainly define the expectations of employers and regulatory agencies; however, they do not substitute for the obligation of management to prove just cause, including providing due process and considering extenuating circumstances and the consistency of penalties.

These and other issues will be decided on a case-by-case basis and a common law of arbitration developed on the basis of specific policies as applied in specific evidentiary records. The ubiquity of cell phones and PEDs in our society may make for difficult analysis, particularly where the penalty of dismissal is sought for conduct in which many people regularly engage in virtually all parts of their lives—talking, texting, and gaming—even at some considerable risk to their and others' safety.