

Summary of Comments and Agency Decisions

Title: Cranes and Derricks in Construction: Railroad Roadway Work, CFR 1926

Administrative Order Number: 3-2021

Adopted: June 2, 2021

Effective: June 2, 2021

Oregon OSHA Perspective on Rulemaking History and Summary

Oregon OSHA adopted these rules as written and adopted by federal OSHA. The nationwide conditions that created the need for this rulemaking are identically relevant in the State of Oregon. Oregon OSHA held one stakeholder meeting in regards to this rulemaking. The stakeholders who attended endorsed Oregon OSHA's proposed action to adopt the rules without modification. Oregon OSHA received no official comments in regards to this rulemaking. Since this rulemaking consists of adopting a federal OSHA rule as written, is deregulatory in nature, and is supported by affected stakeholders Oregon OSHA relies on the federal OSHA language for the bulk of this document. The History section of this document is identical to the language from the federal OSHA Federal Register filing. The Summary section likewise contains federal OSHA language but is abbreviated significantly and excludes explanatory language. The Comment section of this document contains Oregon OSHA's language in regards to stakeholder comments. The federal OSHA Federal Register filing document can be found at this web address: <https://www.osha.gov/laws-regs/federalregister/2020-09-15>.

The identifying details of the Federal Register filing are as follows:

[Federal Register Volume 85, Number 179 (Tuesday, September 15, 2020)]

[Rules and Regulations]

[Pages 57109-57122]

From the Federal Register Online via the Government Publishing Office [www.gpo.gov]

[FR Doc No: 2020-17179]

Federal OSHA History

OSHA published the Cranes and Derricks in Construction standard on August 9, 2010 (29 CFR part 1926, subpart CC, 75 FR 47906). The crane standard resulted from years of work by a negotiated rulemaking committee that drew from a wide range of stakeholders to include industry and labor best practices to draft regulatory requirements to prevent crane tip overs, electrocution from crane contact with power lines, workers being struck by the equipment or loads, crane collapse because of improper assembly, and other hazards associated with the operation of cranes in construction work. The crane standard added many new provisions, addressing topics such as requirements to ensure safe ground conditions underneath equipment, mandatory safety devices, distance from power lines, inspection procedures, workplace area controls to prevent workers from entering hazardous areas, and new operator certification requirements.

On October 7, 2010, the Association of American Railroads and a number of individual railroads (hereafter collectively referred to as AAR) filed a petition challenging the rule. That petition remains before the United States Court of Appeals for the District of Columbia Circuit (Case No. 10-1386), but after AAR provided more background and additional information about existing practices in the railroad industry, the parties reached a settlement in which OSHA agreed to issue an interpretation of the standard as it relates to railroads and to propose revisions to the regulatory text of the crane standard. The settlement followed extensive discussions with AAR and officials from FRA and the principal labor organization representing affected employees, the Brotherhood of Maintenance of Way Employees Division (Teamsters) (BMWED). OSHA also reviewed the settlement with the Brotherhood of Railroad Signalmen (BRS). In deciding to enter into the settlement, OSHA acknowledged the lack of a record of significant injuries or fatalities resulting from the use of cranes or derricks for railroad track construction and maintenance and the consensus between labor and management groups that the proposed exemptions and alternatives would continue practices generally accepted as safe in the railroad industry. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the crane standard. In 2018, OSHA published a notice of proposed rulemaking (NPRM) seeking public comment on the proposed regulatory changes for the railroad industry that had been included in the settlement agreement (83 FR 34076 (July 19, 2018)).

Subsequent to the settlement agreement executed between AAR and OSHA in September 2014, FRA issued a final regulation involving, among other issues, safety-related training requirements for the use of railroad cranes and railroad roadway maintenance machines (hereafter, RMMs will mean [railroad] roadway maintenance machines) equipped with a hoisting device. \1 This regulation also included other revisions to FRA regulations addressing the use of RMMs (79 FR 66460, November 7, 2014).

\1 The railroad industry relies on a number of different pieces of equipment to deliver and position the ballast rock that supports the railroad ties, the ties that support the rail, and the rail itself. Railroads also use the equipment to install railroad signal posts and to keep the tracks and the areas immediately alongside the track free from debris and other impediments to trains. The railroad industry classifies this equipment collectively as "roadway maintenance machines," which are defined in FRA regulations as devices "powered by any means of energy other than hand power . . . being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary" (49 CFR 214.7). The "roadway" referenced in this definition does not refer to a road over which cars or trucks would travel; within the railroad industry it refers to the area encompassing the tracks, track support, and nearby items that could foul the track (see, e.g., the definition of "roadway worker" in 49 CFR 214.7). Most of this equipment falls within the scope of OSHA's Cranes and Derricks Standard in subpart CC because it is "power operated equipment" and includes some form of hoisting device that allows the equipment to be used to "hoist and lower and horizontally move a suspended load" (see 29 CFR 1926.1400(a)).

As dictated by Section 4(b)(1) of the Occupational Safety and Health (OSH) Act (29 U.S.C. 653), to the extent FRA regulations exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health, OSHA is preempted from applying regulatory requirements of its own to the corresponding working conditions addressed. On March 19, 2019,

following the publication of OSHA's NPRM, FRA provided OSHA further information clarifying that FRA intends to preempt the potential applicability of most of the OSHA requirements addressed in OSHA's NPRM (see Docket ID: OSHA-2015-0012-0015) through FRA regulations. Thus, OSHA concludes that those affected parts of the OSHA crane standard do not apply with regard to the operation of RMMs.

Although any exemption from OSHA requirements resulting from the preemption of OSHA statutory authority by FRA would apply whether or not the OSHA regulations include any specific exemptions, OSHA believes it is still appropriate to amend the Code of Federal Regulations (CFR) to include the explicit exemptions for RMMs in the OSHA crane standard. Having the exemptions specified in the OSHA crane standard will provide additional clarity for employers in the railroad industry, including contractors, who may be unfamiliar with the legal implications of FRA's action. A clearer understanding of which regulatory requirements are applicable will ultimately result in a more effective regulatory program and improved safety.

Thus, as explained in this preamble, OSHA is adding certain exemptions and clarifications to the crane standard. Some of these exemptions recognize the unique equipment and circumstances in railroad roadway work, while others reflect the preemption of some OSHA requirements by FRA.

This rule is an E.O. 13771 deregulatory action. Details on the estimated costs and cost savings for this rule can be found in the final rule's economic analysis in section III of this preamble.

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule not a "major rule" as defined by 5 U.S.C. 804(2).

Rule Change Summary

A. Exemption for Flash-Butt Welding Trucks and Equipment with Similar Attachments

This final rule adds paragraph (c) (18) to Sec. 1926.1400 of the crane standard, as proposed, in order to exclude flash-butt welding trucks and equipment with similar attachments from the requirements of part 1926, subpart CC.

B. New 29 CFR 1926.1442 To Address Railroad Equipment

Title 29 CFR 1926.1442, which addresses severability, is currently the last section of the crane standard. OSHA is redesignating the severability provision currently in 29 CFR 1926.1442 as Sec. 1926.1443 to enable the addition of a new Sec. 1926.1442 dedicated to the RMMs addressed in this rulemaking.

Rather than insert the various new RMM exceptions throughout subpart CC, this final rule consolidates them into a single section for the convenience of the affected parties and to maintain the organizational integrity of subpart CC. Aside from the Sec. 1926.1400(c)(18) exclusion for flash-butt welding trucks and similar equipment, Sec. 1926.1442 will contain all of the new provisions addressed through the settlement.

C. Scope of New Sec. 1926.1442

New Sec. 1926.1442(a) sets out the scope of the new exemptions. The limited exemptions for railroads in the new Sec. 1926.1442 apply to work on the construction of railroad tracks and supporting structures, including the railroad ties supporting the tracks, the ballast and the road bed that support

the track and ties, and the poles and other structures on which railroad signal devices and signage are mounted.

D. Section 1926.1442(b)(1) Operator Certification, Training, and Evaluation

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act, which exempts from the Act the working conditions of certain employees with respect to which other Federal agencies exercise statutory authority to prescribe and enforce occupational safety and health standards.

E. Section 1926.1442(b)(2) Rail Clamps, Rail Stops, and Work-Area Controls

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Final rule Sec. 1926.1442(b)(2) exempts employers from three requirements. Section 1926.1442(b)(2)(i) and (ii) provides exemptions from subpart CC requirements for using rail stops and rail clamps on equipment covered by subpart CC. Under Sec. 1926.1442(b)(2)(iii), OSHA provides an exemption from work area controls specified by Sec. 1926.1424(a)(2) when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b).

F. Section 1926.1442(b)(3) Out-of-Level Work

This paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Section 1926.1442(b)(3) exempts RMMs from restrictions on out-of-level work. These OSHA restrictions, including the requirements to comply with out-of-level manufacturer procedures in Sec. 1926.1402(b), the inspection requirements in Sec. 1926.1412(d)(l)(xi), and the requirement that machines have out-of-level indicators in Sec. 1926.1415(a)(l), address the risk of equipment tipover and loss of control of the load.

G. Section 1926.1442(b)(4) Dragging a Load Sideways

The exemption in Sec. 1926.1442(b)(4) in this final rule provides relief from the prohibition in Sec. 1926.1417(q) against using cranes or derricks to drag a load sideways. It has been an existing practice during many track construction projects for RMMs to drag rail or ties sideways. The practice of dragging long pieces of rail sideways off the ties or to position them on top of the ties is routine and critical to the process of track construction. This practice does not have a ready alternative, does not involve lifts more than a few feet off the ground, and the movement of the load is predictable because the procedure is repeated over and over with the same materials.

H. Section 1926.1442(b)(5) Boom-Hoist Limiting Device

Section 1926.1442(b)(5) of this final rule clarifies existing Sec. 1926.1416(d)(1), which requires equipment manufactured after December 16, 1969, to have a boom-hoist limiting device. Traditionally, boom hoists wind wire rope around a revolving drum. At the other end of the wire rope is a ball, to which a hook or other device can be attached, that can be pulled up toward the tip of the boom. The boom hoists continue to wind until stopped by the operator, a limiting device, or by damaging the machine. The process is somewhat analogous to a fisherman winding line on a rod and reel: If too much winding occurs, the lure is pulled into the rod tip; more winding bends and breaks the rod or detaches the lure. The limiting device prevents similar results on boom-hoist equipped cranes and derricks by

automatically stopping winding when the ball is pulled too close to the tip of the boom. On hydraulic cylinder/piston equipped booms, the Sec. 1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. Thus, OSHA proposed to exempt RMMs using a hydraulic piston for raising and lowering the boom from the requirement for a boom-hoist limiting device in Sec. 1926.1416(d)(1) (83 FR at 34081).

I. Section 1926.1442(b)(6) Manufacturer Guidance for Modifications Covered by Sec. 1926.1434

Section 1926.1442(b)(6) in this final rule provides an exemption for certain railroad machines from the requirements of Sec. 1926.1434, which requires employers to obtain and follow the equipment manufacturer's guidance for equipment modifications. OSHA's proposed exemption was conditioned on procedural prerequisites such as the employer obtaining approval from an RPE for equipment modifications not permitted by the manufacturer (83 FR at 34081). The AAR and the two labor organizations (BRS and BMWED) addressed the issue and supported the exemptions, while the latter comment requested that engineer approval be in writing. (See Docket ID: OSHA-2015-0012-0011, p. 7; OSHA-2015-0012-0014, p. 3.)

J. Section 1926.1442(b)(7) Other Manufacturer Guidance

Section 1926.1442(b)(7) in this final rule provides an exemption for certain RMMs from the requirements of several other sections of subpart CC that require employers to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications. The requirements are found in Sec. Sec. 1926.1404(j), (m), and (q); 1926.1417(a), (r), (u), and (aa); 1926.1433(d)(1)(i); and 1926.1441. Under the final rule, these requirements do not apply if the employer is subject to the requirements of 49 CFR part 214.

Comments

Oregon OSHA held one stakeholder meeting for this rulemaking on February 16, 2021 prior to filing the proposed rule. The railroad industry stakeholders who attended voiced support for Oregon OSHA adopting the rules without modification. Oregon OSHA did not receive any written comments nor oral testimony in regards to this rulemaking during the public comment period of the rule proposal