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Exempt Action: Final Regulation Agency Background Document

Agency name	Department of Labor and Industry
Virginia Administrative Code (VAC) Chapter citation(s)	16 VAC25-175-1926.1440; 16 VAC25-175-1926.1442
VAC Chapter title(s)	Federal Identical Construction Industry Standards
Action title	Cranes and Derricks in Construction: Railroad Roadway Work, Final Rule
Final agency action date	November 12, 2020
Date this document prepared	November 12, 2020

Although a regulatory action may be exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the *Code of Virginia*, the agency is still encouraged to provide information to the public on the Regulatory Town Hall using this form. However, the agency may still be required to comply with the Virginia Register Act, Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This action is necessary to meet the requirements of federal law and is therefore exempt from the requirements of the Administrative Process Act (APA) under §2.2-4006.A.4(c).

OSHA is revising the standard for cranes and derricks in construction to provide specific exemptions and clarifications with regard to the application of the standard to cranes and derricks used for railroad roadway work. These exemptions and clarifications recognize the unique equipment and circumstances in railroad roadway work and reflect the preemption of some OSHA requirements by regulations promulgated by the Federal Railroad Administration (FRA).

Federal 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 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 Federal 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 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, Federal 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. This regulation also included other revisions to FRA regulations addressing the use of RMMs (79 FR 66460, November 7, 2014). 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, Federal OSHA is preempted from applying regulatory requirements of its own to the corresponding working conditions addressed.

On March 19, 2019, following the publication of Federal OSHA's NPRM, FRA provided Federal 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, Federal OSHA concluded that those affected parts of the Federal OSHA crane standard do not apply with regard to the operation of RMMs.

Although any exemption from Federal OSHA requirements resulting from the preemption of Federal OSHA statutory authority by FRA would apply whether or not the Federal OSHA regulations include any specific exemptions, Federal OSHA believed it was still appropriate to amend the Code of Federal Regulations (CFR) to include the explicit exemptions for RMMs in the Federal OSHA crane standard.

Having the exemptions specified in the Federal 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.

Broadly, Federal OSHA proposed to add one exemption to §1926.1400 (c), redesignate §1926.1442 as §1926.1443, and add a new §1926.1442, Railroad roadway maintenance machines.

Each change is discussed briefly below.

A. §1926.1400 Subpart CC Exclusions; Paragraph (c), Exemption for Flash-Butt Welding Trucks and Equipment With Similar Attachments

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

Flash-butt welding trucks are RMMs with low-hanging workhead attachments. These machines are equipped with an attachment designed to suspend and move a welding workhead low and

close to the rails in order to precisely weld two sections of rail together. Other machines that fall within this exemption are similarly designed to suspend and move specific operation workheads low to the rails. This class of machines does not have any other hoisting device. AAR provided examples of these machines to OSHA prior to publication of the proposed rule (see Docket ID: OSHA– 2015–0012–0008).

Because these machines are not capable of raising and suspending the workhead more than a few feet above the ground or roadbed, and the weight and structure of the workhead does not appear to present any danger of equipment tipover at any point during the workhead's full range of motion, Federal OSHA believes that equipment in this class does not present the types of safety hazards Federal OSHA intended to address in the crane standards and equipment with similar attachments from the requirements of part 1926, subpart CC.

B. New §1926.1442 To Address Railroad Equipment

This section addresses severability and is currently the last section of the crane standard. The final rule redesigns the severability provision currently in §1926.1442 as § 1926.1443 to enable the addition of a new § 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 § 1926.1400(c)(18) exclusion for flash-butt welding trucks and similar equipment, § 1926.1442 will contain all of the new provisions addressed through the settlement.

C. Scope of New §1926.1442

New § 1926.1442(a) sets out the scope of the new exemptions. The limited exemptions for railroads in the new § 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. The exemptions do not apply to other types of construction activities that may be related to railroads, such as the construction of buildings, retaining walls, fences, or platforms controlled by railroads.

When the exemptions do not apply, the crane standard continues to apply to construction activities conducted by employers in the railroad industry as it does to employers in other industries. The final rule applies these exemptions to equipment covered by subpart CC that meets the definition of "Roadway Maintenance Machine" as defined in 49 CFR 214.7, regardless of whether the equipment is used for railroad bridge construction work or for other construction work involving railroad tracks and supporting structures.

The final rule specifies that the exemptions apply only to the extent that the RMM activities remain subject to the authority of FRA. For example, Federal OSHA's exemptions would apply to railroad bridge construction subject to subpart B of 49 CFR part 214 (Bridge Worker Safety Standards), but the use of cranes to construct a highway bridge over railroad track would not be exempt to the extent that FRA lacks authority to regulate that activity to ensure the safe operation of that equipment. Federal OSHA's crane standard, including its requirements for operator training, certification, and evaluation, would apply in full to the latter class of construction activity.

D. §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.

Following Federal OSHA's promulgation of the crane standard in subpart CC, FRA promulgated training requirements for operators of RMMs equipped with hoisting devices. FRA's rule included a clear statement in the preamble that after the effective date of the new rule, "FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than Federal OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427" (79 FR 66460, 66475 (November 7, 2014)).

This final rule therefore exempts all of the operator "qualification and certification" requirements in § 1926.1427, as well as the operator training requirements in § 1926.1430.

E. §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 §1926.1442(b)(2) exempts employers from three requirements. §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. §1926.1442(b)(2)(iii) provides an exemption from work area controls specified by §1926.1424(a)(2) when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b).

FRA's interpretation of its regulations in its communication to Federal OSHA stated clearly that it intended the regulations at 49 CFR part 214 (specifically, §§214.307, 214.341(b), and 214.357(b)) to preempt all three categories of Federal OSHA's requirements when operating RMMs: "FRA regulations ensure employers put in place sufficient protections to prevent the types of hazards that OSHA intended to prevent through its work-area control, rail clamp and rail stop requirements."

F. §1926.1442(b)(3) Out-of-Level Work

This paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act. §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 §1926.1402(b), the inspection requirements in §1926.1412(d)(l)(xi), and the requirement that machines have out-of-level indicators in §1926.1415(a)(l), address the risk of equipment tipover and loss of control of the load.

The record in this rulemaking indicates that out-of-level operation is a longstanding and necessary practice in the railroad industry. Industry practices already account for load-chart adjustments and other standard practices to address out-of-level work. In 2010, OSHA responded to the unique nature of railroad work conditions with an exception to the out-of-level work prohibition for railroad equipment but limited the exception to include only equipment traveling on the tracks (see § 1926.1402(f)).

Following the rulemaking, AAR explained that many RMMs, like a swing loader crane, often travel next to the track (as opposed to on it) but frequently must work out-of-level because the ballast and road bed are sloped.

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

This exemption in §1926.1442(b)(4) in this final rule provides relief from the prohibition in §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. §1926.1442(b)(5) Boom-Hoist Limiting Device

§1926.1442(b)(5) of this final rule clarifies existing § 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. The boom hoists continue to wind until stopped by the operator, a limiting device, or by damaging the machine.

On hydraulic cylinder/piston equipped booms, the § 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, this final rule exempts RMMs using a hydraulic piston for raising and lowering the boom from the requirement for a boom hoist limiting device in § 1926.1416(d)(1) (83 FR at 34081).

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

§1926.1442(b)(6) in this final rule provides an exemption for certain railroad machines from the requirements of §1926.1434, which requires employers to obtain and follow the equipment manufacturer's guidance for equipment modifications.

As discussed earlier with respect to out-of-level work, however, in 49 CFR 214.341 and 214.357 FRA has chosen to address the issue of manufacturer's guidance and how it will allow departure from that guidance. FRA communicated to Federal OSHA that FRA views its regulations as preempting Federal OSHA's jurisdiction to require compliance with manufacturer instructions and guidance. (See Docket ID: OSHA–2015–0012– 0015.) Therefore, to reflect the extent of FRA's preemption, the final rule includes this exemption.

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

§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 §§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.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, internal staff review, petition for rulemaking, periodic review, or board decision). "Mandate" is defined as "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Under 29 CFR 1953.5(a), where a Federal program change is a new permanent standard, or a more stringent amendment to an existing permanent standard, the State shall promulgate a State standard adopting such new Federal standard, or more stringent amendment to an existing Federal standard, or an

at least as effective equivalent thereof, within six months of the date of promulgation of the new Federal standard or more stringent amendment.

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On November 12, 2020, the Safety and Health Codes Board adopted final rule for Cranes and Derricks in Construction: Railroad Roadway Work as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of January 7, 2021.

To access the Cranes and Derricks in Construction: Railroad Roadway Work, Final Rule, please click on the link below:

<https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17179.pdf>

**Cranes and Derricks in Construction Industry: §§1926.1400 and 1926.1442
Final Rule**

As Adopted by the
Safety and Health Codes Board

Date: November 12, 2020



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: January 7, 2021

16VAC25-175-1926.1400, Cranes and Derricks, §§1926.1400 and 1926.1442

When the regulations, as set forth in 29 CFR Part 1926.1400 and 1926.1442 of the Final Rule for Cranes and Derricks in Construction are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms

VOSH Equivalent

29 CFR

VOSH Standard

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

September 15, 2020

January 7, 2021

Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming, Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only.

VIII. Unfunded Mandates Reform Act of 1995

OSHA reviewed this final rule in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 *et seq.*) and Executive Order 13132 (64 FR 43255). OSHA determined that this rule does not add new costs because the regulatory changes are exemptions.

OSHA's standards do not impose any duties on state and local governments except in states that elect voluntarily to adopt a State Plan approved by the agency. OSHA is not aware of any tribal governments that operate railroads using equipment that would be subject to this rulemaking, and the regulatory changes create exceptions to the rule, not new duties. Consequently, this rule does not meet the definition of a "Federal intergovernmental mandate" (see Section 421(5) of the UMRA (2 U.S.C. 658(5))).

Therefore, for the purposes of the UMRA, the agency certifies that this final rule does not mandate that state, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than \$100 million in any year.

IX. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249 (November 9, 2000)) and determined that it does not have "tribal implications" as defined in that order. The final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 1926

Construction industry, Cranes, Derricks, Occupational safety and health, Railroad roadway work.

Authority and Signature

This document was prepared under the direction of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S.

Department of Labor, Washington, DC 20210.

The agency issues the sections under the following authorities: 29 U.S.C. 653, 655, 657; 40 U.S.C. 3704; 33 U.S.C. 941; Secretary of Labor's Order 1-2012 (77 FR 3912 (1/25/2012)); and 29 CFR part 1911.

Signed at Washington, DC, on August 3, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated in the preamble of this final rule, OSHA is amending 29 CFR part 1926 as follows:

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart CC—Cranes and Derricks in Construction

■ 1. The authority citation for subpart CC of 29 CFR part 1926 continues to read as follows:

Authority: 40 U.S.C. 3701 *et seq.*; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 5-2007 (72 FR 31159) or 1-2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

■ 2. Amend § 1926.1400 by adding paragraph (c)(18) to read as follows:

§ 1926.1400 Scope.

* * * * *

(c) * * *

(18) *Flash-butt welding trucks.* Flash-butt welding trucks or other roadway maintenance machines not equipped with any hoisting device other than that used to suspend and move a welding device or workhead assembly. For purposes of this paragraph (c)(18), the terms *flash-butt welding truck* and *roadway maintenance machine* refer to railroad equipment that meets the definition of "roadway maintenance machine" in 49 CFR 214.7 and is used only for railroad track work.

* * * * *

§ 1926.1442 [Redesignated as § 1926.1443]

■ 3. Redesignate § 1926.1442 as § 1926.1443.

■ 4. Add a new § 1926.1442 to read as follows:

§ 1926.1442 Railroad roadway maintenance machines.

(a) *General rule.* Employers using equipment covered by this subpart that meets the definition of "roadway maintenance machine," as defined in 49 CFR 214.7, must comply with the requirements in this subpart, except as provided in paragraphs (b)(1) through (7) of this section when subject to the

authority of the Federal Railroad Administration.

(b) *Exceptions—(1) Operator certification, training, and evaluation.* The requirements in §§ 1926.1427 (Operator qualification and certification) and 1926.1430 (Training) do not apply. The qualification and training requirements contained in §§ 1926.1436(q) (Qualification and training for derricks), 1926.1440(a) (Sideboom cranes), and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) do not apply.

(2) *Rail clamps, rail stops, and work-area controls.* (i) The requirement for rail clamps in § 1926.1415(a)(6) does not apply;

(ii) The requirement for rail stops in § 1926.1415(a)(6) does not apply; and

(iii) The work-area controls specified by § 1926.1424(a)(2) do not apply.

(3) *Out-of-level work.* The restrictions on out-of-level work, and the requirements for crane-level indicators and inspections of those indicators (including the requirements in §§ 1926.1402(b), 1926.1412(d)(1)(xi), and 1926.1415(a)(1)), do not apply.

(4) *Dragging a load sideways.* The prohibition in § 1926.1417(q) on dragging a load sideways does not apply.

(5) *Boom-hoist limiting device.* The requirement in § 1926.1416(d)(1) for a boom-hoist limiting device does not apply to roadway maintenance machines when the cranes use hydraulic cylinders to raise the booms.

(6) *Manufacturer guidance for modifications covered by § 1926.1434.* The requirements to follow the manufacturer's guidance set forth in § 1926.1434 do not apply if the employer is subject to the requirements of 49 CFR part 214.

(7) *Other manufacturer guidance.* The requirements to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications, set forth in § 1926.1404(j), (m), or (q); § 1926.1415(a)(6); § 1926.1417(a), (r), (u), or (aa); § 1926.1433(d)(1)(i); or § 1926.1441 do not apply if the employer is subject to the requirements of 49 CFR part 214.

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