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SFA**BILL ANALYSIS**

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Senate Bills 1250 and 1251 (as introduced 4-25-02)
Sponsor: Senator John J. H. Schwarz, M.D.
Committee: Judiciary

Date Completed: 5-8-02

CONTENT

Senate Bill 1250 would amend the Code of Criminal Procedure to revise the sentencing guidelines designation for a third or subsequent offense of operating a locomotive under the influence of liquor and/or a controlled substance, and include in the guidelines the felonies of operating a locomotive under the influence, or while impaired, causing death or serious impairment of a body function, as proposed by Senate Bill 1251.

Senate Bill 1251 would amend the Railroad Code to revise provisions prohibiting the operation of a locomotive while under the influence of or impaired by alcohol or a controlled substance. The bill would do all of the following:

- Prohibit a person from operating a locomotive in Michigan if he or she had a bodily alcohol content (BAC) of .02 gram or more per 100 milliliters of blood, 210 liters of breath, or 67 milliliters of urine (rather than prohibiting operation by a person whose blood contains .10% or more of alcohol).
- Increase criminal penalties for operating a locomotive while under the influence or while impaired.
- Prescribe felony penalties for operating a locomotive while under the influence or while impaired, causing a death or serious impairment of a body function.
- Revise the prohibition against and criminal penalty for authorizing or knowingly permitting a person to operate a locomotive while under the influence.
- Revise provisions pertaining to the chemical analysis of a person's alcohol level.
- Include visible impairment due to the consumption of alcohol and/or a controlled substance in the Code's prohibition against operation of a locomotive while under the influence, and repeal a section of the Code that prohibits operation of a locomotive while impaired (MCL 462.355).

Senate Bill 1250 is tie-barred to Senate Bill 1251.

Senate Bill 1250

A third offense of operating a locomotive under the influence is a Class E felony against the public safety, with a statutory maximum sentence of four years' imprisonment. The bill would change the statutory maximum in the sentencing guidelines to five years' imprisonment, as proposed by Senate Bill 1251.

The bill would include in the sentencing guidelines new felonies proposed by Senate Bill 1251, as shown in Table 1.

Table 1

Violation	Felony Class	Crime Category	Statutory Maximum
Operating a locomotive under the influence or while impaired causing death	C	Person	15 Years
Operating a locomotive under the influence or while impaired causing serious impairment of a body function	E	Person	5 Years

Senate Bill 1251

Drunk Operation of a Locomotive

The Code prohibits a person from operating a locomotive engine upon railroad tracks in Michigan if his or her blood contains .10% or more by weight of alcohol. The bill instead would prohibit a person from operating a locomotive upon Michigan railroad tracks if he or she had a BAC of .02 gram or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Currently, operating a locomotive while under the influence or with a blood alcohol level (BAL) of .10% or more is a misdemeanor punishable by up to 90 days' imprisonment, a fine of not less than \$100 or more than \$500, or both, together with costs of the prosecution. Operating a locomotive while impaired (under the provision that would be repealed by the bill), is a misdemeanor punishable by up to 90 days' imprisonment, a maximum fine of \$300, or both, plus costs of the prosecution. In addition, as part of a sentence for either violation, the court may order the person to perform up to 12 days of community service.

Under the bill, a violation of operating a locomotive while under the influence, while impaired, or with a BAC of .02 gram or more would be a misdemeanor punishable by up to 93 days' imprisonment, a fine of not less than \$100 or more than \$500, or both, plus costs of the prosecution. Also, the court could order up to 45 days of community service.

Currently, a violation of operating a locomotive while under the influence, while impaired, or with a BAL of .10% or more, within seven years of a prior conviction, is punishable by up to one year's imprisonment, a maximum fine of \$1,000, or both, plus costs of the prosecution. Under the bill, that penalty would apply to operation with a BAC of .02 gram rather than a BAL of .10%, and would include a minimum fine of \$200.

Under the Code, a violation of operating a locomotive while under the influence or with a BAL of .10% or more, within 10 years of two or more prior convictions, is punishable by up to four years' imprisonment, a maximum fine of \$2,000, or both, plus costs of the prosecution. Under the bill, the penalty would be up to five years' imprisonment, a fine of not less than \$500 or more than \$5,000, or both, plus costs of the prosecution, and would apply to operating a locomotive while under the influence, while impaired, or with a BAC of .02 gram or more.

Causing Death or Serious Impairment

Under the bill, a violation of operating a locomotive while under the influence, while impaired, or with a BAC of at least .02 gram that caused the death of another person would be punishable by up to 15 years' imprisonment, a fine of not less than \$2,500 or more than \$10,000, or both.

A violation that caused a serious impairment of a body function of another person would be

punishable by up to five years' imprisonment, a fine of not less than \$1,000 or more than \$5,000, or both. "Serious impairment of a body function" would mean that term as defined in the Michigan Vehicle Code (MCL 257.58c). Under that Code, serious impairment includes, but is not limited to, one or more of the following:

- Loss of a limb, foot, hand, finger, thumb, eye, or ear or the use of a limb, foot, hand, finger, thumb, eye, or ear.
- Loss or substantial impairment of a bodily function.
- Serious visible disfigurement.
- A comatose state that lasts for more than three days.
- Measurable brain or mental impairment.
- A skull fracture or other serious bone fracture.
- Subdural hemorrhage or subdural hematoma.
- Loss of an organ.

Authorizing or Permitting Operation

The Railroad Code prohibits the owner or person in charge or in control of a locomotive engine or a conductor of any train of cars from authorizing or knowingly permitting the locomotive to be operated upon railroad tracks in Michigan by a person who is under the influence of alcohol and/or a controlled substance. A violation is a misdemeanor punishable by up to 90 days' imprisonment, a fine of not less than \$100 or more than \$500, or both, plus costs of the prosecution. The bill would include in that provision operation of a locomotive by a person who was impaired by alcohol and/or a controlled substance or who had a BAC of .02 gram or more, and would increase the maximum length of imprisonment to 93 days.

Chemical Analysis

The Code provides that the amount of alcohol or presence of a controlled substance, or both, in the blood of a locomotive operator at the time alleged, as shown by chemical analysis of that person's blood, urine, or breath, is admissible into evidence in a criminal prosecution for any of the following:

- Operating a locomotive while under the influence, with an unlawful BAL, or while impaired, or authorizing or permitting such operation.
- Manslaughter resulting from the operation of a locomotive while the operator is alleged to have been impaired or under the influence or to have an unlawful BAL.

The bill would delete provisions that specify presumptions arising from the amount of alcohol in a locomotive operator's blood as shown by chemical analysis. Under those provisions, it is presumed that the person was not under the influence if there was .07% or less by weight of alcohol in his or her blood, that he or she was impaired if there was more than .07% but less than .10% blood-alcohol, and that he or she was under the influence if there was .10% or more.

The Code provides that a sample or specimen of urine or breath may be taken and collected in a reasonable manner. Only a licensed physician, or a licensed nurse or medical technician under the direction of a physician and qualified to draw blood acting in a medical environment, at the request of a peace officer, may withdraw blood for chemical analysis of the amount of alcohol or presence of a controlled substance. Under the bill, blood could be drawn by a licensed physician or an individual operating under the delegation of a physician, as allowed under the Public Health Code (MCL 333.16215). (That Code allows a physician to delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience, the performance of selected acts, tasks, or functions that fall within the physician's

scope of practice and will be performed under the physician's supervision.)

The Railroad Code provides that liability for a crime or civil damages based on withdrawing blood and related procedures does not attach to a qualified person who withdraws or assists in the withdrawal of blood, unless the act is performed in a negligent manner. The bill would extend this liability protection to the analysis of blood, and would apply the protection to a licensed physician or individual operating under the delegation of a licensed physician.

A person charged under the Code must be advised that, if he or she refuses a peace officer's request to take a chemical analysis test, one will not be given without a court order. The bill specifies that the person also would have to be advised that the officer could seek to obtain that court order.

The bill would delete a provision specifying the jury instruction that must be given if either the prosecution or the defendant requests a jury instruction regarding a defendant's refusal to submit to a chemical test. (This instruction includes a statement that the defendant's refusal is not evidence of his or her guilt, and is not to be considered in determining guilt or innocence.)

Under the Code, if a locomotive operator involved in an accident is transported to a medical facility and a sample of his or her blood is withdrawn, the result of a chemical analysis of that sample is admissible in a criminal prosecution for operating a locomotive under the influence. Under the bill, that result would be admissible in any civil or criminal proceeding.

If a locomotive operator involved in an accident is deceased, a sample of his or her blood must be withdrawn by the medical examiner or attending personnel of the medical facility for the purpose of determining blood-alcohol content or the presence of a controlled substance. The results of that test must be released to the Department of State Police and the medical examiner. The bill specifies, instead, that the results would have to be released to a prosecuting attorney for use in a criminal prosecution.

MCL 769.36 & 777.14m (S.B. 1250)
462.105 et al. (S.B. 1251)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Senate Bills 1250 and 1251 would have an indeterminate fiscal impact on State and local government.

There are no statewide data available at this time to indicate how many offenders are convicted of a first or second offense for operating a locomotive under the influence. A first-time offense would be punishable by incarceration in a local facility for up to 93 days rather than 90 days. A second-time offender would still receive up to one year's imprisonment. Local units incur the cost, which varies from \$27 to \$65 per day.

According to the 1999 Department of Corrections Statistical Report, no offenders were convicted of or serving time for a third offense of operating a locomotive under the influence. Raising the statutory maximum for this offense from four years to five would increase the longest allowable minimum sentence from 32 months to 38 months. If an offender were convicted and received the longest allowable minimum sentence, it would increase the cost to the State by \$12,500, given that the average annual cost of incarceration is \$25,000.

Offenders who operate a locomotive while under the influence and cause serious impairment

of body function of another person are currently most likely to be charged with operating a locomotive under the influence and receive up to 90 days in a local facility. Under Senate Bills 1250 and 1251, an offender would receive up to five years in a State prison. The State, rather than local units, would incur the cost of incarceration, at an average annual cost of \$25,000. If one offender were convicted of this offense and received the longest allowable minimum sentence, it would cost the State \$79,000.

Offenders who operate a locomotive while under the influence and cause death are currently most likely to be charged with operating a locomotive under the influence but also may be charged with manslaughter and can receive up to 15 years' imprisonment. Under the bills, an offender would be convicted of operating a locomotive while under the influence and causing death and would receive up to 15 years' imprisonment. To the extent that the bills would increase the length of sentences served by offenders for this act, by creating the new offense with a lower standard of proof than manslaughter, they could increase State costs. If one additional offender were convicted and received the longest allowable minimum sentence, rather than receiving up to 93 days for operating a locomotive under the influence, it would cost the State \$237,500.

The bills also could increase State and local criminal justice costs by making the blood alcohol level, used to determine whether someone is operating a locomotive under the influence, more strict, thereby increasing the number of offenders convicted for these offenses.

In addition, the bills would benefit libraries by increasing penal fine revenues. If one offender were convicted of each of the applicable offenses, penal fine revenue would increase at least \$4,200 and could increase as much as \$15,500.

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