

## RAILROAD RISK ASSESSMENTS, HAZARDOUS CARGO, AND RESPONSES TO EMERGENCIES - BACKGROUND MEMORANDUM

Section 2 of Senate Bill No. 2188 requires the Legislative Council to study risk assessments for railroad facilities, the handling of hazardous cargo by railroads, and the ability of railroads to respond to potential accidents and emergencies, including sabotage, terrorism, and other crimes. This study must include an evaluation of whether whistleblower protection would provide a desirable response in employees to report dangerous conditions or violations of laws relating to hazards, emergencies, and accidents. Section 1 of the bill required a railroad corporation to provide immediate notification of an accidental release of hazardous material to the Department of Emergency Services.

As introduced, Senate Bill No. 2188 would have required the operator of a rail facility to provide a risk assessment to the Public Service Commission, Division of Homeland Security, and the Department of Emergency Services. The risk assessment would have had to include:

1. The location and function of the rail facility.
2. All types of cargo that are moved through, or stored at, the rail facility.
3. Any hazardous cargo that has moved through, or stored at, the rail facility.
4. The frequency that any hazardous cargo is moved through, or stored at, the rail facility.
5. A description of current capabilities to prevent acts of sabotage, terrorism, or other crimes.
6. All training programs required of employees.
7. The emergency response procedures to deal with acts of sabotage, terrorism, or other crimes.
8. The procedures to communicate with local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders.

As introduced, Senate Bill No. 2188 would have required a rail operator to implement an infrastructure protection program and the program would have required training to all employees on how to recognize, prevent, and respond to acts of sabotage, terrorism, and other crimes. The bill would have required a rail operator to train employees of contractors and subcontractors and evaluate their background, skills, and fitness as is done for employees. The rail operator would have been required to provide the Public Service Commission, Division of Homeland Security, and the Department of Emergency Services a copy of the infrastructure protection program. The program would have been required to be updated at least once per year and the Public Service Commission was allowed to make orders concerning the program.

In addition to the risk assessment and the infrastructure protection program, Senate Bill

No. 2188, as introduced, would have required a rail operator to secure hazardous materials with adequate security personnel and in secure facilities designed for storage. In addition, the rail operator would have been required to secure occupied locomotives from hijacking, sabotage, or terrorism.

As introduced, Senate Bill No. 2188 would have required a rail operator to provide communications to local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders so that they could be alerted in a timely manner of sabotage, terrorism, and other crimes. The railroad operator would have been required to immediately notify the Department of Emergency Services of an accidental release of or derailment involving a hazardous material. This was the only substantive provision that was retained and passed from the bill as introduced.

Senate Bill No. 2188, as introduced, would have provided whistleblower protection for an employee who reports a violation of North Dakota Century Code (NDCC) Chapter 49-10.1. Chapter 49-10.1 relates to regulation of railroads by the Public Service Commission. The bill provided an employee with a civil remedy against a rail operator who took punitive actions against the employee.

Senate Bill No. 2188, as introduced, was based upon a California law known as the Local Community Rail Security Act of 2006. The legislative history for Senate Bill No. 2188 revealed concern about getting information from railroads after incidences when cargo was spilled.

The committee heard from opponents of the bill. The committee was informed that California is involved in litigation over the law because, among other things, the law is preempted by federal law. There was testimony that the railroads have been cooperating with federal agencies in addressing the issues contained in Senate Bill No. 2188, and the proposal would be counterproductive to those efforts and conflict with them in some key areas. One of the main concerns was secrecy of information and the more people with information would result in greater risks to security. As such, it was argued that there is a need for a nationwide, uniform approach and this approach should be from rules adopted by the Transportation Security Administration, which is part of the Department of Homeland Security, and the Pipeline and Hazardous Safety Administration and Federal Railroad Administration, which are part of the United States Department of Transportation.

The committee heard from proponents of the bill. The committee was informed that there is no specific requirement for railroads to report derailments to any state or local officials. There was testimony that railroads do not cooperate with state and local

emergency responders and the information relating to spilled materials during a derailment has been only provided after too much time and too much resistance. There was testimony that employees want more training.

## STATE JURISDICTION OVER RAILROADS

Barring a constitutional limitation, states have the power to regulate railroads within the state. The major limitation on this power comes from the commerce clause of the Constitution of the United States. Under the commerce clause, a state may not discriminate against an out-of-state entity without an important noneconomic state interest and there can be no reasonable nondiscriminatory alternative. Even if a state does not discriminate, a state cannot burden interstate commerce if the burden outweighs the state's interest. Even if a state passes one of the preceding tests, under the supremacy clause, the "Constitution, and Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land" and Congress can supersede conflicting state laws or preempt all the state laws in the same field under a specifically listed power in the Constitution.

Under the commerce clause, Congress has the power to "regulate commerce with foreign nations, and among the several states, and with Indian tribes." Under the necessary and proper clause, Congress can "make all laws which shall be necessary and proper for carrying into execution" the commerce clause. The commerce clause is broad in scope and regulation under the clause may address any activity, even if entirely intrastate, that taken with other like acts affects commerce in other states. The necessary and proper clause is broad in scope and extends the commerce clause to anything appropriately related to railroads. In short, Congress has the power to regulate anything relating to railroads.

Generally, the intent of Congress is that railroads should be regulated primarily on the national level through an integrated network of federal law. In particular, Congress has passed laws relating to railroad employees, economic regulation, safety regulation, and taxation.

## ECONOMIC REGULATION

Under the Interstate Commerce Act of 1887, freight railroads became the first industry in the United States to become subject to comprehensive federal economic regulation. Railroads were regulated by the federal government through the Interstate Commerce Commission for the next 93 years. In 1980 Congress passed the Staggers Rail Act. The Staggers Rail Act deregulated the railroad industry, but not completely. The Interstate Commerce Commission retained authority to set maximum rates or take certain other actions if railroads were found to have abused market power or engaged in anticompetitive behavior. In addition, the Interstate Commerce Commission

continued to have jurisdiction over railroad line abandonments. With the passage of the Interstate Commerce Commission Termination Act of 1995, the Surface Transportation Board succeeded the Interstate Commerce Commission as the federal agency with jurisdiction over railroads. Under 49 U.S.C. 10501(b), the Surface Transportation Board has **exclusive jurisdiction over:**

- (1) **transportation by rail carriers**, and the remedies . . . with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, . . .

[T]he remedies . . . with respect to regulation of rail transportation are **exclusive and preempt** the remedies provided under Federal or State law. (emphasis supplied)

Transportation is defined as including property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail and services related to that movement, including receipt, delivery, storage, handling, and interchange of passengers and property. Rail carriers is defined as a person providing common carrier railroad transportation for compensation. Railroad is defined to include a switch, spur, track, terminal, terminal facility and freight depot, yard, and ground used or necessary for transportation.

In exercise of commerce power, Congress has preempted most economic regulation by states of railroads. There are three forms of preemption--express, field, and conflict. Express preemption is when Congress explicitly preempts state law. Field preemption is when congressional regulation of a field is so pervasive or the federal interest so dominant that the intent to preempt can be inferred. Conflict preemption is when a state law stands as an obstacle to the purpose of a federal statute. When the preemption is explicit, as in the previous statute, the first step is to look at the plain meaning of the statute. However, there is a presumption against the federal government supplanting the historic state police powers unless preemption is the clear and manifest purpose of Congress.

In a 2002 article in *Widener Journal of Public Law*, "Wheeling and Lake Erie Railway Co. v. Pennsylvania Public Utility Commission: Pennsylvania Maintains Police Powers Over Railroad Bridge Construction Despite the Interstate Commerce Commission Termination Act of 1995," the author states:

Few courts in the country have addressed whether the ICC Termination Act preempts the states' police powers, and the courts that have addressed this issue have held that

Congress intended to preclude the states from regulating any aspect of the railway industry based on the broad jurisdiction clause of the statute.

In addition to having exclusive jurisdiction over "transportation by rail carriers," the broadly inclusive phrase "regulation of rail transportation" evidences congressional intent to preclude state remedies for violation of any state laws or rules regulating rail transportation. As stated in *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573 (N.D. Ga. 1996), "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." In *Burlington Northern Santa Fe Corporation v. Anderson*, 959 F.Supp. 1288 (D. Mont. 1997), the court stated the "federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive."

In *City of Auburn v. U.S. Government*, 154 F.3d 1025 (1998), cert. denied, 119 S. Ct. 2367 (1999), the Ninth Circuit Court of Appeals addressed federal preemption of local environmental regulation. In that case, the city of Auburn asserted that congressional preemption over railroads only related to economic regulation of rail transportation, not the traditional state police power of environmental review. The court found that the plain language of the Interstate Commerce Commission Termination Act explicitly granted the Surface Transportation Board exclusive authority over railway projects. The court found that any distinction between economic and noneconomic regulation begins to blur. Noneconomic regulation can turn into economic regulation if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

## **SAFETY REGULATION**

The federal regulation of railway safety is accomplished through the Federal Railway Safety Act. In the Act, Congress has expressly provided for state regulation of railroad safety. Under 49 U.S.C. 20106, national uniformity is provided as follows:

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order . . .

1. is necessary to eliminate or reduce an essentially local safety or security hazard;
2. is not incompatible with a law, regulation, or order of the United States Government;
3. and does not unreasonably burden interstate commerce.

Under this scheme, state regulations can fill gaps where the secretary has not regulated and a state can respond to safety concerns of a local rather than national character. In addition, under 49 U.S.C. 20113, the states may enforce federal safety regulations in certain circumstances if the state is certified to investigate railroads for violations under 49 U.S.C. 20105.

In *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993), the United States Supreme Court found that language under the Federal Railroad Safety Act preempted the state common-law duty to operate a train at a safe speed. The Court said that federal regulation of speed limits should be understood as "covering the subject matter" of the state law. Federal railroad safety regulations cover the same subject matter if the regulation substantially subsumes the same subject matter as a federal regulation and does more than merely touch upon or relate to a federal regulation. Under *Burlington Northern and Santa Fe Railway Company v. Doyle*, 186 F.3d 790 (1999), the Seventh Circuit Court of Appeals opined that even nonregulation can be regulation preempting state regulation. This happens when the Federal Railroad Administration has examined and determined that there is no need for regulation.

Congress has provided for specific regulation applicable to different aspects of railway safety under 49 U.S.C. 20131 through 20153 and the Federal Railroad Administration has made many rules relating to these areas of railroad safety. There are statutes or rules relating to noise omissions, whistles, locomotive boiler inspections, and safety as to cars and the coupling of cars, among other things. Whether a certain state action is preempted depends upon the type of regulation. For example, locomotive boiler inspection and car safety are preempted through field preemption. In other areas, there may be no rule or rules that allow cooperation between state and federal authorities. Any state regulation of safety requires a review of federal law and Federal Railroad Administration rules to determine if the regulation is preempted or allowed and, if allowed, in what measure. The courts give great weight to an agency delegated with authority over an area to determine whether a state law should be preempted.

## **OVERVIEW OF FEDERAL AND INDUSTRY ACTION**

An overview of rail safety and security was given by Mr. Joseph H. Boardman, Administrator, Federal Railroad Administration, to the Senate Committee on Commerce, Science and Transportation on

January 18, 2007. The following are excerpts from that testimony and provides a good overview of rail safety and security issues:

The Federal Railroad Administration's (FRA) primary mission is to promote the safety of the U.S. railroad industry and to reduce the number and severity of accidents and incidents arising from railroad operations. Our railroad safety mission necessarily includes our involvement in railroad security issues.

The U.S. Department of Homeland Security (DHS) and its Transportation Security Administration (TSA) have primary responsibility for transportation security, with FRA providing support in the railroad sector. FRA works closely with TSA and the railroad industry on a daily basis in addressing railroad security and safety issues, participates in the Government Coordinating Council for Rail, and contributed its expertise to the National Strategy for Transportation Security and the National Infrastructure Protection Plan.

### **Overview of the Railroad Industry**

Typically railroads move about 1.7 to 1.8 million carloads of hazardous materials (hazmat) yearly, with roughly 105,000 of these carloads being toxic inhalation hazard (TIH) materials, such as chlorine and anhydrous ammonia. Over 64 percent of TIH materials are currently transported by rail. The railroads have an outstanding record in moving all goods safely. The vast majority of hazardous materials shipped by rail every year arrive safely and without incident, and train accidents involving a release of hazardous materials that causes death are infrequent and rare, even while rail traffic volumes have increased steadily. As discussed below, DOT has an aggressive and comprehensive action plan to address the root causes of hazmat accidents, to examine and improve the integrity of rail tank cars used to transport hazmat, and to improve the railroads' hazmat security plans. In addition, DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) annually provides grant funds to States and Indian tribes to assist in the development, improvement, and implementation of hazmat emergency response plans, and to train emergency responders to respond to hazmat accidents and incidents; details on this program are contained in PHMSA's Web site ([hazmat.dot.gov](http://hazmat.dot.gov)).

### **FRA's Railroad Safety Program**

FRA is the DOT agency charged with carrying out the Federal railroad safety laws. . . .

While most of FRA's rules are focused on the safety of railroad operations and not explicitly based on security concerns, they also necessarily have some bearing on security.

In addition, FRA enforces in the rail mode of transportation the Hazardous Materials Regulations, which are promulgated by PHMSA. These regulations include requirements that railroads and other transporters of hazmat, as well as shippers, have and adhere to security plans and also train their employees involved in offering, accepting, or transporting hazmat on both safety and security matters . . . .

To address the key safety issues facing the railroad industry, in May 2005, DOT and FRA launched an aggressive and ambitious National Rail Safety Action Plan with the following strategy:

- Target the most frequent, highest-risk causes of accidents;
- Focus FRA's oversight and inspection resources more precisely; and
- Accelerate research efforts that have the potential to mitigate the largest risks.

FRA's plan includes initiatives in several areas [, including] . . . improving emergency preparedness and enhancing hazmat safety, including evaluating and improving the integrity of tank cars used to transport hazmat . . . .

Though the Action Plan is focused on rail safety, rail security will also be improved. In particular, enhancements to hazmat safety and emergency preparedness will result in enhancements to rail security.

Since the September 11<sup>th</sup> terrorist atrocities, FRA has been actively engaged in the railroad industry's response to the terrorist threat. The railroads have developed their own security plans, and FRA has worked with the railroads, rail labor, and law enforcement personnel to develop the Railway Alert Network, which permits timely distribution of information and intelligence on security issues.

. . .

Separate annexes have been signed concerning the implementation of the Homeland Security Council's recommendations concerning TIH materials, and concerning the coordination between FRA and TSA, FTA and TSA, and PHMSA and TSA on security matters.

The FRA-TSA annex provides for close cooperation between the two agencies on railroad security regulations, legislation, research and development, inspection activities, and response to threats to railroad security in order to maximize passenger and freight railroad security while minimizing disruptions to railroad operations to the extent practicable. The agreement provides that if an FRA inspector observes a significant security issue, the information will be provided to TSA and the railroad; similarly, if a TSA inspector observes a significant rail safety issue, the information will be provided to FRA and the railroad.

### Freight Railroad Security

Railroads have voluntarily developed and adopted security plans based on comprehensive risk analyses, and the national intelligence community's best practices, that address the security of not only hazmat but of freight in general. The Association of American Railroads (AAR) has established guidance for the major freight railroads in the form of a model strategic security plan. The railroad industry has also developed a detailed protocol (AAR Circular OT-55-1) on recommended railroad operating practices for transportation of high-risk hazardous materials (including TIH).

FRA, PHMSA, and TSA have jointly worked with the railroad industry to build upon the railroads' security efforts through vulnerability assessments, development of voluntary security action items, and rulemakings. Additionally, FRA has arranged a conference to permit railroads and chemical shippers to discuss routing options for the movement of TIH materials . . . .

A special force for FRA and DOT, collectively, is the security of hazmat transported by rail. A major initiative has been PHMSA's March 2003 regulation requiring each shipper and carrier of significant quantities (placardable amounts) of hazmat to adopt and comply with a security plan. See 49 CFR 172.800 *et seq.*

Under the PHMSA regulation, security plans must include an assessment of security risks and appropriate countermeasures or mitigation strategies, or both, to address those risks. The plans must, at a minimum, address three specific areas: The security of company personnel; unauthorized access to company property; and the security of hazmat shipped or transported by the company from its origin to its destination. To assist railroads that transport hazmat and shippers that offer hazmat for transportation by rail to comply with this regulation, particularly small- and medium-sized companies, PHMSA developed a program on how to write and implement security plans for their companies.

FRA recognizes that railroad and shipper employees' awareness and understanding of the PHMSA regulation and procedures governing the safe and secure transportation of hazmat shipments are critical. Therefore, PHMSA's regulation provides for safety and security training for employees engaged in the transportation of hazmat. Specifically, each shipper and carrier of significant quantities of hazmat is also required to conduct two types of security training for its employees: security awareness training that provides an awareness of risks associated with hazmat transportation and methods designed to enhance hazmat transportation security, and in-depth security training concerning the company's security plan and its implementation. These training

requirements are also recurrent; employees must receive the required training at least every three years.

In April 2004, DHS and DOT took specific actions to improve the security of rail shipments of TIH materials. As part of this initiative, DHS and DOT, in cooperation with the railroads, are assessing the vulnerabilities of High Threat Urban Areas (HTUAs) through which TIH materials move by rail in significant quantity.

The Action Items address system security and access control (i.e., practices affecting the security of railroads and their property), as well as en-route security (the actual movement and handling of railcars containing TIH materials), particularly in HTUAs. Full implementation of the Action Items is expected to raise the security baseline for the transportation of TIH materials. Implementation of the first 24 Action Items had begun when they were announced in June 2006, and implementation of the remaining 3 Action Items dealing with HTUAs had also been initiated when they were announced on November 21, 2006.

In August 2004, DOT and TSA published a notice and request for comments in the Federal Register asking for input on aspects of TIH rail shipments, the DOT security program requirement, and the need for additional regulation.

Specifically, PHMSA's proposal would require railroads to:

1. Compile annual data on specified hazmat rail shipments;
2. Use the data annually to analyze safety and security risks along rail transportation routes where those materials are transported and one possible alternative to each route;
3. Utilize the analyses in selecting the safest and most secure commercially practicable routes the carrier is authorized to operate over in transporting these materials;
4. Address the security risks associated with shipments delayed in transit or temporarily stored in transit as part of their security plans;
5. Notify consignees if there is a significant unplanned delay affecting the delivery of certain types of hazardous material;
6. Work with shippers and consignees to minimize the time a rail car containing certain types of hazardous materials is placed on track awaiting pick-up or delivery or transfer from one carrier to another;
7. Notify storage facilities and consignees when rail cars containing certain types of hazardous materials are delivered to a storage or consignee facility; and

8. Conduct security visual inspections at ground level of rail cars containing hazardous materials to inspect for signs of tampering or the introduction of an improvised explosive device (IED).

In late 2005, FRA granted a request by the AAR and the American Chemistry Council to convene a section 333 conference to discuss ways to minimize security and safety risks flowing from the transportation by rail of TIH materials. Section 333 of title 49 of the United States Code authorizes the FRA Administrator, as delegate of the Secretary of Transportation, to convene conferences at the request of one or more railroads to address coordination of operations and facilities of rail carriers in order to achieve a more efficient, economical, and viable rail system. Persons attending a section 333 conference are immune from antitrust liability for any discussions at the conference, and can also receive immunity for any resulting agreements that receive FRA approval. The conference has been carefully structured to minimize antitrust concerns involving the chemical manufacturers and shippers. The conference provides the railroads and chemical manufacturers and shippers with the opportunity to meet and discuss approaches to reduce the amount of TIH materials moved by rail, and to enhance the safety and security of TIH materials that are moved. FRA, PHMSA, and representatives from the Department of Justice, the Federal Trade Commission, TSA, and the Surface Transportation Board (STB) are participating in these discussions. The initial efforts of the conference are focused on chlorine and anhydrous ammonia rail transport because they represent over 80 percent of all TIH rail shipments. FRA has met with the rail carriers to discuss modeling and routing options. Further meetings with the rail carriers, as well as separate meetings with the chlorine and anhydrous ammonia shippers, are planned for early this year. In some instances, the projects agreed to at the conference may need the approval of the STB in order to be implemented.

### **Passenger Railroad Security**

[I]n the area of passenger railroad security, FRA requires each railroad that operates intercity or commuter passenger train service or that hosts the operation of such service to adopt and comply with a written emergency preparedness plan approved by FRA. See 49 CFR Part 239. The regulation makes clear that an "emergency" includes a security-related situation. Each plan must address employee training and qualification, and provide for both initial and recurrent training. Additionally, each railroad must establish and maintain a working relationship with emergency responders on its line by taking measures such

as developing and making available a training program on the plan and inviting the emergency responders to participate in emergency simulations. The regulation requires railroads providing passenger service to periodically conduct full-scale passenger train emergency simulations (with actual equipment and simulated victims) and conduct a debriefing and critique session after actual or simulated passenger train emergency situations.

Emergency communication is one of the main focuses of the emergency systems NPRM. Under the proposal, all existing passenger cars would be required to be equipped with a public address system by 2012 that provides a means for a crewmember to communicate to all train passengers in an emergency situation, and all new passenger cars would be required to be equipped with an intercom system that provides a means for passengers and crewmembers to communicate with each other in an emergency situation. . . . The proposed rulemaking would also promote passenger and employee safety in an emergency situation--whether resulting from an accidental or an intentional act--by enhancing requirements for emergency window exits in passenger cars and mandating that all passenger cars, including existing cars, have rescue windows for emergency responder access.

Complementing FRA's regulations, Amtrak and commuter railroads have instituted their own security plans and conduct security training.

In partnership with FTA, FRA also participated in security risk assessments on the ten largest commuter railroads and contributed the funding for security risk assessments on three of these railroads.

### **SPECIFIC RELATED FEDERAL REGULATION**

Under 49 U.S.C. 5107, the Secretary of the Department of Transportation is required to make rules requiring training that hazmat employers are to give hazmat employees on the safe loading, unloading, handling, storing, and transportation of hazardous materials and emergency preparedness for responding to an accident or incident involving the transportation of hazardous materials. Under U.S.C. 5110, if there is an incident involving hazardous material being transported in commerce, the person transporting the material, must immediately upon the request of appropriate emergency response authorities disclose to the authorities information about the material.

Under 49 U.S.C. 5125, if complying with the requirement of a state or local government and a federal requirement is not possible or the state or local requirement is an obstacle to accomplishing in carrying out the federal requirement, the state or local requirement is preempted. In addition, the state or

local regulation would be preempted if the regulation was not substantially the same as the federal regulations to one of the following areas:

1. The designation, description, and classification of hazardous materials.
2. The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.
3. The preparation, execution, and use of shipping documents.
4. The written notification, recording, and reporting of unintentional release in transportation of hazardous material.
5. The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of packaging for a container sold as qualified for use in transporting hazardous material.

As a result of these statutes, under 49 C.F.R. 172 et seq., there are requirements that emergency response information regarding hazardous material be on the train and made immediately available to federal, state, or local responders. That information must include an emergency response telephone number that is answered all the time. In addition, railroads are required to have a security plan dealing with personal security, unauthorized access, and in route security of shipments. The plan must be in writing and updated as circumstances change.

In addition to rules on hazardous materials, the Federal Railroad Administration has adopted rules relating to all railroads. Under 49 C.F.R. 22.13, employees of a railroad are required to immediately report by the quickest means available derailments, collisions, storms, washouts, fires, obstructions to tracks, and hazardous conditions. Under 49 C.F.R. 225.9, each railroad must report immediately to the National Response Center any accident or incident arising from the operation of a railroad. The railroad must have an internal control plan to ensure complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of a railroad. The railroad shall disseminate this policy to the employees and shall provide whistleblower protection to any person subject to this policy.

Under 49 C.F.R. 840.3, the operator of a railroad must notify the National Transportation Safety Board at the earliest practical time after the occurrence of a number of railroad accidents. The notification must be within two hours, if among other things, the accident resulted in damage to a tank car or container resulting in the release of hazardous materials or involving evacuation of the general public or if there was a fatality at a grade crossing. The notification must occur within four hours after the accident if there was damage of \$150,000 or more and the accident did not involve a passenger train.

## RECENT CHANGES IN FEDERAL LAW

On August 3, 2007, the President signed into law the "Implementing Recommendations of the 9/11 Commission Act of 2007." The legislation includes significant rail security measures that had originally been introduced in "The Rail and Public Transportation Security Act of 2007."

Some sections of the Act that closely relate to railroads are listed below, and the sections that relate closely to the study of the committee are in bold:

- **Section 1511. Railroad transportation security risk assessment and national strategy.**
- **Section 1512. Railroad carrier assessments and plans.**
- Section 1513. Railroad security assistance.
- Section 1514. Systemwide Amtrak security upgrades.
- Section 1515. Fire and life safety improvements.
- Section 1516. Railroad carrier exercises.
- **Section 1517. Railroad security training program.**
- Section 1518. Railroad security research and development.
- Section 1519. Railroad tank car security testing.
- Section 1520. Railroad threat assessments.
- **Section 1521. Railroad employee protections.**
- Section 1522. Security background checks of covered individuals.
- Section 1523. Northern border railroad passenger report.
- Section 1524. International Railroad Security Program.
- Section 1525. Transmission line report.
- Section 1526. Railroad security enhancements.
- Section 1528. Railroad preemption clarification.

Under Section 1511, the Secretary of Homeland Security is required to establish a task force to complete a nationwide risk assessment of a terrorist attack on railroad carriers by the beginning of February 2008. The assessment must include a methodology, identification and evaluation of critical assets and infrastructure, identification of risks to those assets and infrastructure, identification of risks to passengers and cargo, an assessment of employee training, and an assessment of private and public actions and integration of those actions.

By the beginning of May 2008, the Secretary of Homeland Security must develop and implement the "National Strategy for Railroad Transportation Security." The plan must prioritize actions to:

1. Improve the security of railroad infrastructure.
2. Deploy equipment and personnel to detect security threats.
3. Train railroad employees in terrorism prevention, preparedness, and response activities.

4. Conduct public outreach campaigns for railroads.
5. Provide additional security.
6. Ensure the continued movement of freight and passengers in event of an attack.
7. Coordinate existing and planned railroad security initiatives undertaken by the public and private sectors.
8. Assess the usefulness of covert testing of railroad security systems.
9. Assess the ability to integrate security into infrastructure design.
10. Assess the implementation of random searches.

The plan must include the roles of all levels of government and stakeholders. The Secretary of Homeland Security must consult with all stakeholders in making the plan.

Under Section 1512, by August 2008 the Secretary of Homeland Security must make rules requiring railroads assigned to a high-risk tier to conduct vulnerability assessments and submit a security plan. The vulnerability assessments require the identification and evaluation of critical railroad carrier assets and infrastructure, the identification of the vulnerabilities to those assets and infrastructure, the identification of strengths and weaknesses, and the identification of redundant and backup systems.

The security plan must include the identification of a security coordinator; a list of capital and operational improvements; procedures to be implemented or used by the railroad in response to a terrorist attack; identification of steps taken with state and local law enforcement agencies, emergency responders, and federal officials to coordinate in response to a terrorist attack; a strategy and timeline for training; enhanced security measures for heightened security risks; plans for redundant and backup systems; and a strategy for implementing enhanced security for security-sensitive materials.

Under Section 1516, the Secretary of Homeland Security is required to establish a program for conducting security exercises for railroad carriers and entities to be assessed under the program include state and local agencies.

Under Section 1517, by February 2008 the Secretary of Homeland Security must develop and issue rules for a training program to prepare railroad employees for potential security threats and conditions. The training must include best practices and must include understanding security incident procedures, including procedures for communication with governmental and nongovernmental emergency response providers and for on-scene interaction with these providers.

Under Section 1521, there is whistleblower protection for employees and contractors that:

1. Provide information to assist in any investigation regarding any conduct which the employee reasonably believes to constitute a violation of federal law.
2. Refuse to violate any law.
3. File a complaint applicable to railroad safety or security.
4. Notify the railroad carrier or Secretary of Homeland Security of a work-related injury or illness.
5. Cooperate with a safety or security investigation.
6. Furnish information to any government agency as to the facts relating to any accident or incident resulting in injury or death or damage to property occurring in connection with railroad transportation.

In addition, this section provides enforcement actions and remedies for the employee.

### **SUGGESTED STUDY APPROACH**

The committee may wish to receive testimony from railroad employees and state and local agencies that would respond to an accident or incident involving railroad facilities. The committee may wish to review present plans to address the area of study by the railroads and the federal government. The committee may review this information to find any area the state may assist in providing for the safety of the citizens of this state in relation to accidents or incidents occurring on rail facilities.