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**Chapter VII**

**SAFETY LAWS AND REGULATIONS**

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### PURPOSE OF CHAPTER

This chapter describes briefly and generally the structure of the Federal laws and regulations relating to railroad safety and analyzes that structure to determine its strengths and weaknesses in terms of its affect on rail safety.

In particular, this chapter indicates the extent to which gaps or overlaps exist in necessary rail safety powers, and the impact of the rulemaking process upon the substance and effectiveness of the rules produced by that process.

### STRUCTURE OF FEDERAL RAILROAD SAFETY LAWS

Chapter IV describes the evolution of Federal railroad safety laws from those addressing specific problems with specific solutions to laws covering all areas of railroad safety and providing broad regulatory and administrative powers to deal with the safety problems of those areas. The structure provided by these laws for executing safety programs is built primarily on the power to regulate activities or conditions affecting safety, with concomitant powers to conduct inspections to ascertain whether the laws and regulations are being complied with, and to enforce compliance by means of assessing monetary penalties or taking other legal action. These powers are the centerpiece of the Federal Railroad Safety Act (FRSA) of 1970 (45 U.S. C. ~421 et seq.), as well as of many of the early safety laws.

Supplementing the regulatory, inspection and enforcement powers are powers to collect accident information, inspect railroad accidents, conduct research and development, and conduct testing, evaluation, and training. Under the early safety laws, these supplementary powers were typically not granted, although the Interstate Commerce Commission could exercise some of these powers from other authority provided under the Interstate Commerce Act (see sections 12 and 20). The FRSA remedied this situation by providing all of the administrative powers necessary to carry out comprehensive

rail safety programs (45 U.S. C. 437). Similarly, the Hazardous Material Transportation (Haz Mat) Act (49 U.S. C. §1801 et seq. ) provided the Secretary with such powers in support of the regulatory program with respect to the transportation of hazardous materials.

The early safety laws applied only to “common carriers” as that term is used in the Interstate Commerce Act. This, of course, was to be expected since that Act had established the scope of the Government’s regulation of rail transportation. However, this limitation excludes application of these laws to railroad systems that are not involved in interstate commerce, such as industrial railroads, rapid transit systems, and commuter railroads. The FRSA provides authority of broader application since it reaches “all areas of railroad safety” (45 U.S. C. §431(a)). The legislative history of the FRSA indicates that it was intended to encompass not only “common carriers” but also every other means of rail transportation (House Rept. No. 91-1194, p. 16), although recent litigation has cast some doubt about the applicability of the FRSA to rapid transit (see *Chicago Transit Authority v. Flohr et al.*, 7th Cir., No. 77-1137, Dec. 16, 1977, pet. for rehearing pending). Similarly, recent legislation concerning transportation of hazardous materials has expanded the applicability of Federal laws on that area to cover not only ship-

pers and carriers of hazardous materials, but also manufacturers of the containers and packages in which such materials are transported (49 U.S.C. ~1804(a)).

The next section addresses the extent to which there are gaps or overlaps either in the placement of rail safety authority or in type of

authority conferred. It indicates situations where two agencies are each attempting to exercise certain powers with respect to the same subject matter area, as well as situations where no agency exercises a particular necessary power, or an agency's power is not sufficiently broad to accomplish the intended objective.

## PLACEMENT OF AUTHORITY

Three areas have been identified as being the subject of concurrent powers: accident investigations, hazardous materials regulation, and occupational safety and health. In all other areas of rail safety, the FRA has exclusive jurisdiction, although States are permitted to participate in a limited aspect of the exercise of that jurisdiction (see chapter VIII).

### Accident Investigations

Historically, the ICC had the power under the Accident Reports Act to "investigate all collisions, derailments, or other accidents resulting in serious injury to persons or to the property of a railroad . . . and to make reports of such investigations, stating the cause of the accident, together with such recommendations as it deems proper" (45 U.S. C. 40). In 1966, the power to determine the cause or probable cause of railroad accidents was transferred to the National Transportation Safety Board (NTSB) by section 5 of the Department of Transportation Act. All other powers under the Accident Reports Act were vested through the Secretary of Transportation or the Federal Railroad Administration. Section 5 was repealed in 1975, when NTSB was made an independent agency, and it retained the power to make the probable cause determination for all transportation accidents.

In addition to its limited powers under the Accident Reports Act, FRA has as part of its general administrative powers, under the FRSA, the power to conduct investigations. However,

the same section (45 U.S. C. 437) grants to NTSB the authority "to determine the cause or probable cause and report the facts, conditions and circumstances relating to accidents investigated . . ." by FRA, which authority can be delegated to any office in DOT with the approval of the Secretary.

The NTSB is required by its own enabling act to investigate and determine the "facts, conditions and circumstances and the cause or probable cause or causes of any . . . railroad accident in which there is a fatality, substantial property damage, or which involves a passenger train. . ." (49 U.S.C. 1903 (a)(1)(C)). While there is some difference between the kinds of accidents NTSB is required by its statute to investigate and the kinds of accidents it is authorized by rail safety laws to investigate, it has the exclusive power to determine the cause or probable cause of the accident. FRA, on the other hand, has residual investigatory powers permitting it to investigate for its own purposes, or at NTSB'S direction.

The rationale for establishing NTSB to carry out the investigation function was that there should be vigorous investigation of accidents in all modes of transportation, and continual analysis of the regulations and programs of the agencies charged with safety responsibility (49 U.S.C. 1901). The primary objectives of an NTSB accident investigation were to obtain an independent determination of the cause or probable cause of an accident and to make recommendations as to how similar accidents can be prevented (49 U.S. C. 1903 (a)). Even though the

safety agency for the mode in question (FRA for a railroad accident) might also investigate the accident, such an investigation would be for a different purpose, such as determining whether its rules had been violated. That agency may be unable to render an objective assessment of the causes and conditions surrounding the accident to the extent that such causes and conditions might reflect unfavorably upon the policies and personnel of that agency.

Thus, though there is an overlap in power to investigate railroad accidents between FRA and NTSB, NTSB plays a singular role. Its purposes are to provide unbiased reports of what happened and why with respect to railroad accidents and to provide objective analysis of how to reduce the likelihood of recurrence of transportation accidents and to make the transportation of persons as safe and free from risk of injury as possible. However, in carrying out such a charge, there is the risk that, by reason of a somewhat myopic focus on safety, its reports and recommendations will fail to recognize or provide the means to evaluate the tradeoffs inherent in safety choices. For example, its recommendation might encompass solutions to safety problems that have costs grossly in excess of the benefits to be derived. Such a failure would offset one of the major benefits of its existence—to provide views that are unencumbered by a constituency or program bias as to the most cost-effective actions that can be taken to improve rail safety.

### **Hazardous Materials Regulation**

There are two basic statutes concerning the transportation of hazardous materials. The first, an outgrowth of a 1908 law amended most recently in 1960, is essentially a criminal statute prohibiting transportation of certain hazardous materials except in accordance with DOT regulations. The second was the Haz Mat Act, which substantially expanded the powers with respect to transportation of those materials. This Act also placed all of the responsibilities and duties concerning transportation of hazardous materials with the Secretary. However, it

does require the Secretary to consult with the ICC before issuing any regulation as to the routing of hazardous materials.

In delegating these powers and duties, the Secretary has made an important distinction. Everything under these laws with respect to railroads which pertains to investigations, records, inspections, penalties and specific relief, and consultation with the ICC is to be carried out by FRA (49 CFR 1.49 (f), (s) and (t)); everything else (primarily establishing policy and issuing all hazardous materials regulations, exemptions, and registration certificates) is to be carried out by the Materials Transportation Bureau (MTB) (49 CFR 1.53 (e) and (g)), which is performing the same function for other modes. The reasons for this division are that it maximizes the likelihood that there will be parallel treatment of the handling and transportation of hazardous materials among all modes. In addition, it minimizes the duplication of staff functions and applies particular modal experience where it is most needed. Thus, an FRA inspector who is very familiar with railroads and their equipment would be most capable of carrying out the hazardous materials inspections or investigations. On the other hand, there is also opportunity for conflict where the specific expertise of hazardous materials does not concur with the specific expertise of railroads, and such conflicts, to the extent they might occur, would do so in the development of particular railroad regulations concerning hazardous materials.

### **Occupational Safety and Health**

The FRSA and the Occupational Safety and Health (OSH) Act of 1970 (29 U.S. C. 651 et seq. ) were each considered and adopted by Congress at about the same time, but originated in separate committees. While the potential conflict of these two statutes as applied to the rail industry was obvious, there is very little legislative history as to how Congress envisioned this conflict being resolved. What little legislative history there is points to the following allocation: the Occupational Safety and

Health Administration (OSHA) of the Department of Labor would be responsible for (a) all aspects of health regulation in the rail industry and (b) those aspects of safety regulation which do not relate to rail operations. FRA would be responsible for those areas of safety which do relate to or involve railroad operations.

The conclusion with respect to health arises primarily from (1) the fact that neither health nor safety, though not mutually exclusive terms, can reasonably be read to include the other, and (2) the fact that Congress, being aware of this distinction in this context, did not seek to add health to FRA's jurisdiction. (See text of S. 3061 and H.R. 14417 of 91st Congress, bills considered contemporaneously with the bill that ultimately became the FRSA, which specifically excepted "occupational safety and health of employees not engaged in railroad operations" from FRA's jurisdiction; and hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 7068, 14417 and H.R. 14478, 91st Cong., 2nd Sess., p. 37.) The conclusion with respect to safety and the distinction between "occupational safety" and "all areas of railroad safety" arises from a discussion in the Senate Committee Report accompanying S. 1933, the Senate version of the FRSA concerning the term "railroad operations:"

Within an individual railroad company or corporate structure the bill is intended to have application to those matters *reasonably related to the safe movement and operation of rail equipment*. Matters not peculiar to the basic purpose of a railroad company (i.e. providing transportation by rail) are not intended to be considered as an area of railroad safety. For example, the safe operation of a lathe while it could be relevant to railroad safety is primarily a matter common to the lathe operation both inside and outside of the railroad industry" (S. Rep. No. 91-619, p. 6). (Italics added.)

Thus, there appears to be an intended limitation upon the scope of FRA's jurisdiction that is not inconsistent with the scope of the jurisdiction granted to OSHA.

It must be emphasized, however, that there is very little legislative history concerning the scope of the FRSA with respect to occupational health and safety, which makes conclusions concerning congressional intent somewhat tenuous. Moreover, none of the court decisions concerning the OSH Act as applied to the rail industry have decided the issue of whether FRA had the statutory authority to regulate occupational health and safety, although that issue has never been raised in a manner that required the court to decide it.

The OSH Act, on the other hand, is devoid of any history relating specifically to the railroad industry. However, it does have a provision which is designed to avoid jurisdictional gaps or overlaps:

Nothing in this chapter (OSH Act) shall apply to working conditions of employees with respect to which other Federal agencies . . . , exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health (29 U.S. C. 653 (b) (1)).

The railroads have contended, in cases challenging OSHA'S authority to inspect or enforce its regulations concerning railroad working conditions, that this provision constitutes an industry-wide exemption because FRA does exercise such authority. Each appellate court that has considered this issue has rejected the railroads' contention and held that OSHA has jurisdiction to enforce its regulations as to employee working conditions not covered by an FRA rule. (*Bait. & Ohio RR. Co. v. Occupational Safety and Health Review Commission, et al.*, 548 F.2d 1052 (D. C. Cir., 1976); *Southern Pacific Transportation Co. v. Usery, et al.*, 539 F.2d 386 (5th Cir, 1976); *Southern Railway Co. v. Occupational Safety and Health Review Commission, et al.*, 539 F.2d 335 (4th Cir., 1976).

In each of these cases, there was not any FRA rule on the subject matter of the particular violation at issue. Thus, the question of the extent of FRA's authority will not likely be decided until FRA issues a rule with respect to occupational safety and health and a violation of either

that rule or the corresponding OSHA rule is challenged in court. In March 1975, FRA embarked on the rulemaking process in this area with an advance notice of proposed rulemaking (40 F.R. 10693), and took the second step of issuing a proposed rule on July 15, 1976 (41 FR 29155). This proceeding was cancelled on March 14, 1978 (Federal Register, Volume 43, Number 50, p. 10583).

Shortly after the OSH Act and FRSA were passed, OSHA and FRA attempted to reach some agreement as to their mutual jurisdiction and the best procedure for exercising their particular responsibilities. A very limited Memorandum of Understanding was entered into on May 16, 1972, but that letter agreement was rescinded unilaterally by OSHA on December 23, 1974. Since then, the two agencies have worked on a broader "umbrella" agreement but without any success. On August 5, 1977, in a letter to the Chairman of the Safety Committee of the Railway Labor Executives Association, Secretary Adams endorsed a statement of policy prepared by RLEA to the effect that: (1) FRA would be responsible for administration and enforcement of all existing railroad safety laws and regulations; (2) OSHA would be responsible for all health conditions of railroad employment, including among other things such conditions arising in shops and maintenance and repair facilities; and (3) OSHA would cover all safety conditions not covered by FRA under (1) above. In taking this position, the Secretary is

clearly receding from regulation of occupational health in the rail industry. However, this statement does not answer the other critical issues as to how far FRA's jurisdiction can extend with respect to safety, and how far the Secretary intends FRA to exercise that jurisdiction. Finally, assuming any type of shared jurisdiction, what reporting requirements should reasonably be placed upon railroads by the two agencies?

Thus, notwithstanding an attempt to avoid jurisdictional gaps and overlaps in regulation of occupational safety and health, there clearly has been such a gap with respect to administration of those regulations for railroad employees. This gap has been created in part by the railroads' efforts in contesting OSHA'S jurisdiction (according to OSHA, over the last 4 years almost 40 percent of all OSHA inspections of railroads have been contested and only 11 percent of the fines levied have been collected), in part by what appears to be the low attention given by OSHA to railroad safety, and in part by failure of FRA to assert any jurisdiction in this area. On the other hand, how serious this gap is in terms of employee safety is not known precisely. Available statistics for the 1966-74 period simply do not indicate whether or to what extent the railroad workplace has excessive occupational safety and health hazards, although a substantial portion of the employee casualties appear to have occurred outside of the rail operating environment, indicating that such hazards do exist.

## TYPES OF AUTHORITY CONFERRED

The second perspective from which to determine whether there are gaps or overlaps in the railroad safety laws is gained by comparing the scope and effectiveness of each major type of authority conferred—regulatory, research and development, investigatory (including reporting), enforcement, and other types of authority.

### Regulatory

As discussed above, the early safety laws granted very specific regulatory authority, whereas the later laws (mainly the FRSA) grant broad regulatory authority. However, the approach to such a grant of authority differed

among the early laws. In several instances, they require that the regulations simply be the rules of each railroad as modified by the Secretary, rather than a uniform rule originated by the Secretary. (See Locomotive Inspection Act, 45 U.S.C. 28, concerning rules for inspection of boilers, and Signal Inspection law, 49 U.S.C. 25 (c), concerning rules for installation, inspection, maintenance and repair of signal systems and related devices.) In the case of power brakes, the 1958 amendment to the Safety Appliances Act required the Secretary to adopt the rules of the Association of American Railroads for the installation, inspection, maintenance and repair of power or train brakes, and permits amendment “solely for the purpose of achieving safety” (45 U.S.C. 9).

The Locomotive Inspection Act and Signal Inspection law do not present a problem since, even if the FRA is limited in its authority under that law, its authority under the FRSA can cover any gap. However, the limitation on rulemaking with respect to power or train brakes is more troubling. The problem is basically one of vagueness—that is, how does one determine whether a change in those rules is solely for the purpose of achieving safety. In 1971, the United Transportation Union challenged a change in those rules that it felt would reduce safety and, in any event, had as its primary purpose the reduction of the costs of power brake inspections under certain circumstances. The court upheld the rule on the basis of the FRA hearing examiner’s finding that it would increase safety, and rejected the contention that the original purpose for the change had any legal effect on the rule. (*United Transportation Union, et al., v. U. S., et al.*, 337 F. Supp. 410, aff’d 406 U.S. 964 (1972).

While the Government’s view of the effect of the rule in that case was upheld, it leaves open and subject to question a considerable area of potential rulemaking. For example, the statutory language and the UTU case would appear to prohibit modifications to the rules for the sake of clarity, removing obsolescence, or adjusting to technological change where the modification did not affect safety per se.

Moreover, this standard for rule modification seems to have generated sufficient controversy at least to inhibit the rulemaking process, thereby tending to preserve the status quo. Finally, the use of the term “achieving” is not helpful. The ICC originally interpreted it to permit a modification so long as safety was not lessened, and FRA adopted this same position in September 1968. Others, particularly representatives of rail labor, view this as requiring that the rule modification have a beneficial impact on safety.

It is not clear why Congress singled out the rules for power brakes, among all railroad safety rules, for this unique treatment. At the least, this provision has not contributed, and probably has inhibited, the speed with which such rules are changed to meet changes in industry practice or technology.

In contrast to the early safety laws, the FRSA grants broad rulemaking power in “all areas of railroad safety,” which power is to supplement that of the earlier laws (45 U.S.C. 431. (a)). Thus, to the extent that there were any gaps, whether by reason of applicability or substance, the FRSA was the vehicle to fill these gaps. Indeed, that was its main purpose, particularly in regard to three subject matter areas—track standards, freight car standards, and human factors (e.g. operating rules). Likewise, in the more limited area of transportation of hazardous materials, the grant of regulatory authority has been broadened substantially from the earlier 1908 and 1960 laws by the Haz Mat Act.

However, one gap still remains and that is with respect to regulation of employees’ hours of service. While power to so regulate exists under the FRSA, it would not encompass issuing regulations to deal with the problems presented by the Hours of Service Act. That Act provides regulatory power to FRA only for the very limited purpose of determining under what circumstances employee sleeping quarters would be located “within or in the immediate vicinity” of humping or switching operations. It does not even provide the power to require reports or recordkeeping, although FRA has issued such

rules (49 CFR, part 228) on the strength of other authority.

In order to make up for this gap, FRA has issued its "Statement of Agency Policy and Interpretation" of the Hours of Service Act in the form of an appendix to part 228 of Title 49 of the CFR (42 FR 27594; May 31, 1977). Its stated objectives are to: (1) explain FRA's views on the 1976 amendments to the Act, (2) provide notice of FRA's views on issues of construction and interpretation, and (3) provide an educational tool for those subject to the Act. An unstated objective was to give its views as much force of law as possible, which in part accounts for the public process FRA used in promulgating this statement and the fact that it is to be published in the CFR. Its success in this regard will not be known until a violation of its interpretation is contested in court. Courts typically give considerable deference to the views of an agency charged with administering or enforcing a statute, but the possibility of such deference is certainly not equivalent to a regulation in terms of its legal effect. Even if FRA's interpretations have their intended effect, regulatory authority might still be preferable in order to solve the many nitty-gritty fact questions that arise in regard to the Hours of Service Act, and might thereby lessen the considerable amount of litigation that this Act has spawned since 1969.

### Inspections and Investigations

The power to inspect railroad properties and to investigate the causes of accidents or complaints is, at least in theory, crucial to obtaining full compliance with rail safety laws, regulations, and orders. Initially, Congress did not grant the ICC sufficient powers to carry out these functions. However, in a series of safety laws beginning in 1908, it extended all of the ICC's investigatory, inspection, and enforcement powers to the rail safety laws (see Ash Pan Act, 45 U.S. C. 19; Safety Appliance Acts, 45 U.S. C. 15; Explosives and Other Dangerous Articles Act, 18 U.S. C. 835 (b); Accident Reports Act, 45 U.S. C. 40; and Signal Inspection law, 49 U.S. C. 26 (d) and (g)). In the Locomotive Inspection Act and Signal Inspection law, Con-

gress took a somewhat different approach of requiring the carrier to do its own inspections of locomotives and signal systems, in accordance with its rules as modified and approved by the FRA. In the case of the locomotives, Congress established a specific office in the ICC to conduct these inspections. Thus, for these two laws the inspection system is two-tiered—first the carrier conducting inspections and then the FRA checking the carrier's inspection records and conducting its own spot inspections.

Section 9 of the Safety Appliances Act (45 U.S. C. 9), the power brake provision was amended in 1958 to have the ICC adopt as its rules the AAR rules for maintenance, inspection, and testing of power or train brakes. This amendment was adopted specifically because the ICC lacked the power to prescribe such rules to assure compliance. However, these rules do not have any recordkeeping requirements (such requirements would probably be impractical in this context), and the FRA enforces primarily through unobtrusive spot checking and investigation of complaints.

While the power granted under some of these laws is rather limited, the investigative power granted in the Accident Reports Act covers "all . . . accidents resulting in serious injury to persons or to the property of a railroad . . ." (45 U.S. C. 40). Similarly, the Explosives and Other Dangerous Articles law permits the Secretary to conduct investigations as he deems necessary or proper to the exercise of this authority under that law. Thus, even though among the early safety laws there is rather uneven distribution of the power to conduct investigations, the Accident Reports Act and the Explosives and Other Dangerous Articles law provide broad investigatory powers, together with the power to issue subpoenas, administer oaths, require the production of documents and take testimony. However, the investigatory power under the Accident Reports Act does not reach accidents which do not cause serious injury to a person or the property of a railroad, but do cause such injury to the property other than that of a railroad, such as lading or abutting property.

The more recent rail safety laws have also provided broad inspection and investigation powers (FRSA, 49 U.S.C. 431 (a) and (c)), Hazardous Materials Transportation Act (49 U.S.C. 1808 (a) and (c)). In addition, as discussed above, a separate agency—NTSB—has been established primarily for the purpose of conducting investigations of transportation accidents, and in particular must investigate any railroad accident in which there is a fatality, “substantial” property damage, or which involves a passenger train. Thus, with the addition of these laws, taking all of the rail safety laws as a whole, there does not now exist any important deficiency in the power to conduct investigations, although there are differences among the various laws in the scope of the power or duty granted in this regard.

#### **Enforcement \***

Three types of enforcement mechanisms are employed by the various rail safety laws: (1) the civil fine; (2) a criminal penalty of a fine or imprisonment or both; and (3) a judicially enforceable administrative order or equitable relief (see table 30). The first type is fairly uniform over all the safety laws, which is a monetary civil fine of \$250 to \$2,500 per violation (up to \$10,000 for OSH Act and Haz Mat Act violations), depending on the seriousness of the violation. This enforcement mechanism is by far the most likely to be used for violation of a safety law, order, or rule, and is also the easiest to impose and enforce. This is because the fine is typically small in size, thus not worth much fight, and can be collected directly by FRA without litigation as a result of the Federal Claims Collection Act (FCCA) of 1966 (31 U.S.C. 951 et seq.). The FCCA, which permits enforcing agencies to compromise and collect their penalties up to \$20,000 per violation, is designed to relieve the courts and the Justice Department of the burden that would be im-

posed if enforcing agencies could not settle their claims.

There is no limitation in the FCCA as to the minimum amount to which a penalty may be compromised. However, as indicated in table 30, Congress has established such a minimum for four safety laws in order to obtain “strict enforcement” of the penalty provisions of those laws. This will result in a higher minimum collection per penalty, although it may not affect the overall enforcement of the laws. This is because in seeking collection without litigation, FRA would still need to compromise at an aggregate settlement figure that, as a percentage of the total amount claimed, provides sufficient inducement to the railroads not to litigate. Previously this has been approximately 75 percent and it is not clear whether that percentage will change as a result of the minimum compromise base.

As to the second type of enforcement mechanisms, criminal penalties, only those relating to hazardous materials have any viability. The authority to collect a civil fine in lieu of a criminal penalty for violation of the Accident Reports Act was added in 1974 precisely because it was almost impossible to get a conviction under that Act due to its trivial nature in comparison to the other matters presented to the Justice Department and the courts. The criminal penalty under the Hours of Service Act relates to only a single noncontroversial requirement and has never been used. The two hazardous materials laws each have criminal penalties that are substantially higher than any of the civil penalties and these are viable and have been used, although there does not appear to have ever been a prison sentence because, among other reasons, only companies and not individuals have been prosecuted. On the other hand, it must be emphasized that criminal prosecution is substantially more difficult to complete successfully than a civil penalty for at least three reasons:

1. If the offense is not egregious (e.g. did not result in a death or serious injury), it is difficult to get the Justice Department (particularly the U.S. Attorney’s Office) to

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\*In the lexicon of railroad safety, the process of enforcement begins at the point inspection and investigation leave off—the finding of a violation.

Table 30.—Enforcement Powers

Law	Civil penalty	Criminal penalty	Other
FRSA	\$250-\$2,500 <sup>1</sup>	None	<b>Emergency order, injunctive relief, compliance order</b>
Safety Appliances Acts	\$250-\$2,500 <sup>2</sup> *	None	None
Locomotive Inspection	\$250-\$2,500	None	Order out of service (applicable only to boilers)
Accident Reports Acts	\$250-\$2,500	\$100	None
Ash Pan Act	\$200	None	None
Signal Inspection law	\$250-\$2,500 <sup>1</sup>	None	None
Hours of Service	\$500	\$100-\$1,000; up to 1 year in prison or both	None
Hazardous Materials Transportation Act	upto\$10,000	up to \$25,000; up to 5 years in prison or both	<b>Equitable relief</b>
Explosives and Other Dangerous Articles	None	up to \$1,000; or 1 year in prison or both (\$10,000 and 10 years if death occurs)	None
OSH Act	up to \$10,000	up to \$20,000 or 1 year in prison or both	Abatement, notice in lieu of citation

● Cannot be compromised below \$250 (45 U. S.C. 438 (c))

● Cannot be compromised below \$250 (31 U.S.C. 952 note)

give it much attention, given its other workload;

2. The same is true for the court; and
3. Even if the case is brought to trial, the case must be proved "beyond a reasonable doubt" rather than by the "preponderance of the evidence."

The third type of enforcement, the judicial or administrative order directing certain action, is probably the least used. This power is set forth primarily in the FRSA (equitable relief is available under the Haz Mat Act and there is some order authority under the Locomotive inspection Act ) where it takes three forms:

1. The emergency order issued by FRA under which a facility or piece of equipment is ordered out of service because it is in an

unsafe condition and thereby creates an emergency involving a hazard of death or injury (45 U.S. C. 432);

2. A court order enjoining actions in violation of the FRSA or enforcing rules or orders issued under the FRSA (45 U. S.C. 439); and
3. An order by FRA directing compliance with the FRSA or the rules or orders issued thereunder (45 U.S. C. 437),

This type of enforcement is generally not available for use in obtaining compliance with the early safety laws.

The power to issue orders directing compliance was added in 1974 because previously the FRA could only fine or seek injunctive relief where a carrier was continually violating a law

or rule, unless the violation met the test for an emergency order. If it sought injunctive relief, FRA would have to go through a full judicial process before the relief requested would become mandatory. More importantly, it leaves to the court the determination of the exact relief that would be granted. If FRA issues an order directing compliance, it has control of the terms of that order. If the railroad does not comply, FRA can seek court enforcement, in which case the court simply reviews whether there was a reasonable basis for FRA's order. From FRA's viewpoint, that is a much more favorable procedure than seeking injunctive relief.

Notwithstanding the effectiveness of the emergency order and compliance order mechanisms, these powers have been used very sparingly. Since 1970, only six emergency orders and no orders directing compliance have been issued. This may be due either to the fact that the conditions warranting such enforcement have not occurred with greater frequency, or that FRA has been overly cautious in invoking such authority. Certainly the emergency order by its own terms should be used only where an "emergency" exists, which is likely to be infrequent. However, there is no such limitation for orders directing compliance and there is no apparent reason to indicate why this power has not been used, particularly in cases where a substantial number of violations of a law or regulation have been incurred by a single carrier.

In sum, there does not appear to be any lack of or gap in enforcement authority under the FRSA, but some of that authority may not be employed with sufficient frequency. On the other hand, the early safety laws lack the third type of enforcement authority discussed above and such authority would be useful in enforcing those laws for the same reasons as are discussed above for the FRSA.

### **Reporting and Recordkeeping**

Among the older safety laws, the Accident Reports Act contains the primary authority

with respect to reports and recordkeeping. The Hours of Service Act, Ash Pan Act, and Safety Appliances Act have no such powers or requirements, and the Block Signal law is obsolete. The Locomotive Inspection Act and Signal Inspection law have similar provisions requiring the reporting of locomotive boiler and signal system failures respectively (45 U.S. C. 32, 49 U.S. C. 26 (f)), although in the former, the failure must be reported only if it results in an accident causing serious injury or death.

The Accident Reports Act, as the name suggests, requires carriers to report monthly to FRA all accidents resulting in death or injury to persons or in damage to equipment or roadbed. An accident causing damage only to nonrailroad property does not have to be reported under this Act. The report must indicate the nature, cause, and circumstances of the accident.

The FRSA and the Haz Mat Act provide general powers that permit FRA and the Secretary to require such reports or other information as are deemed necessary to carry out those laws (45 U.S.C. 437 (a), 49 U.S.C. 1808 (a) and (b)). FRA has combined its authority under the FRSA with that of the Accident Reports Act to obtain the information in such form and at such times as it needs (49 CFR 225). NTSB also has authority to require the production of reports and other written information by Government agencies and persons engaged in commercial transportation "with respect to any matter pertinent to transportation safety" (49 U.S.C. 1903 (b) (9)). It should be noted that unlike FRA and the Secretary, NTSB is limited as to whom it can require to produce these reports, though it could itself go out and get any necessary information from anyone.

As for reports by Government agencies, FRA is required to submit an annual report on railroad safety to Congress (45 U.S. C. 440). It also is to receive from each State participating in rail safety activities under the FRSA an annual report, as part of the State's annual certification, on the rail accidents in that State and the activities of the State in its participation in rail safety under the FRSA.

Likewise, the Secretary must give Congress an annual report on hazardous materials transportation (49 U.S.C. 1808 (e)). NTSB must give Congress an annual report containing certain specific safety information (49 U.S.C. 1904) and, in addition, must issue "periodic" reports "recommending and advocating meaningful responses to reduce . . . accidents . . . and proposing corrective steps . . ." (18 U.S.C. 1903 (a) (3)). NTSB also must issue a public report on the facts, conditions, and circumstances of each accident it investigates (18 U.S.C. 1903 (a) (2)).

All of this reporting when aggregated constitutes a considerable volume of reports issued each year. This does not include the special reports and studies that Congress requests from time to time. Since all of these requirements were built up over the years, it may be worth examining the extent to which this volume can be reduced without loss of significant information.

#### Other Authority

As was stated above, the early laws dealt quite specifically with the particular aspect of safety to which the law was addressed, and did not provide broader supplementary powers. To the extent those powers were necessary, they were found in the Interstate Commerce Act (see 49 U.S.C. 12 and 20). However, the ICC did not engage in activities other than those specifically described in that Act. The FRA inherited this same authority.

The FRSA was the first broad grant of authority and provides all administrative powers necessary to carry out the purposes of the Act. The Secretary is specifically authorized to conduct research, development, testing, evaluation, and training (45 U.S.C. 437 (a)). In 1974, as a result of what Congress felt was an overemphasis placed on research and development at the expense of investigation and enforcement, it limited the amount that could be spent from 1975 appropriations for research and development to the amount spent for investigation and enforcement. In 1976, Congress amended the DOT Act to require FRA to have not less than eight

regional safety offices. Both of these amendments indicate the willingness of Congress to legislate limitations on FRA's general administrative powers, if in its oversight Congress feels these powers are not being used effectively.

The FRSA also directs the Secretary to undertake a "coordinated effort" to develop and implement solutions to the "grade-crossing problem" (45 U.S.C. 433 (b)). It was felt that in so directing the Secretary, greater attention would be given to grade crossings, the primary responsibility for which is placed in the Federal Highway Administration (see detailed discussion of the grade-crossing problem in chapter X).

The Haz Mat Act grants broad administrative powers to the Secretary and specifically requires the Secretary to: (a) establish and maintain a technical staff sufficient to evaluate issues connected with hazardous materials transportation, (b) establish a control reporting system and data center, and (c) conduct a continuing review of all aspects of hazardous materials transportation. That Act also gives the Secretary the power to require persons involved in the transportation of hazardous materials to register with DOT not more often than once every 2 years. This power was not sought by DOT and has not been implemented.

In sum, the FRSA and the Haz Mat Act have filled in virtually all of the conceivable gaps in authority relating to rail safety. In fact, in the last couple of years, Congress has taken steps to place some limitations on or provide directions for the use of these powers in order to make them more effective. To some extent, this trend presents a problem since the more that flexibility is removed from administration of the rail safety laws, the less capable Government will be to meet changing needs. On the other hand, Congress has been dissatisfied with the way in which these powers have been exercised (or not exercised) and thus has found it necessary to become more specific as to the use of these powers in order to achieve its goals.

The statutory structure, then, appears to be basically complete, with the exception of the need for authority to issue regulations concern-

ing hours of service, greater flexibility in power brake regulation, and the addition of certain enforcement powers to the early safety laws. If anything, the existing weakness is one of redundancy and obsolescence rather than inadequacy.

However, as Congress has recently shaped this structure to more specific needs, it has begun to burden it with provisions that in the long run could hamper effective administration of the rail safety program.

## STRUCTURE OF FEDERAL RAILROAD SAFETY REGULATIONS

The Federal rules and standards pertaining to railroad safety are established by three entities (OSHA has been excluded from this discussion because its regulations do not deal specifically with the railroad environment): the Materials Transportation Bureau with respect to transportation of hazardous materials, the Federal Railroad Administration with respect to rail operations generally, and the National Transportation Safety Board with respect to accident investigation.

The basic scheme of MTB's rules (49 CFR, parts 102 and 171 to 199) is to set forth (a) the list of each explosive and other dangerous article covered by these rules and give its classification (e.g. class A explosive, flammable liquid, etiologic agent, etc. ) which reflects its most hazardous characteristic (§ 172.5); (b) the requirements for packaging, marking, and labeling each of these materials depending on its mode of transportation (part 173); (c) the requirements for loading, unloading, placarding, and handling of rail cars containing these materials (part 174); (d) the specifications for particular shipping containers (part 178); and (e) the specifications for tank cars (part 179). These rules are voluminous, minutely detailed, and highly technical. They have been formulated over decades by a joint effort of the regulating agency (now MTB, previously the ICC) and the representatives of all of the various groups affected by these rules (see list set forth in §171.7 (c)), particularly the AAR's Bureau of Explosives. As this scheme indicates, these rules form an independent, sophisticated, and integrated system of restrictions on the transportation of these materials, and as such

are considerably different from all other rules applicable to railroad safety. Moreover, they apply not only to the carriers but also to the shippers, packagers, recipients, and other handlers of the materials. Finally, while there is considerable detail relating solely to railroads, there is a much greater amount applicable to other modes, thereby requiring from MTB a multimodal perspective rather than simply focusing on the problems of one mode.

Unlike the integrated structure of MTB's rules, FRA's rail safety rules (49 CFR, parts 209 to 236) cover a series of essentially unrelated matters, reflecting their legislative origins. Part 209 contains FRA's procedures for enforcing the Haz Mat Act and for issuing compliance orders under the FRSA, which were promulgated as a result of the Transportation Safety Act of 1974. FRA's regulations under the Noise Control Act of 1972 appear in Part 210. Part 211 contains the various procedures employed by FRA in its rulemaking and related actions. These were completely revised and reissued at the end of 1976 as a result of the 1976 amendment to the FRSA requiring new procedures with specific time limits for completion of all proceedings to the extent practicable under the FRSA within 12 months (45 U.S. C 430 (d)). While these procedures cover all rulemaking and related actions regardless of whether they are taken pursuant to the FRSA or other laws, FRA stated that it would observe the 12-month time limit for rules promulgated under laws other than the FRSA only "to the extent practicable. "

Part 212 implements the State participation program under the FRSA. Part 213 contains the

track safety standards which were the first rules issued under the FRSA. The companion standards for freight cars are contained in part 215. Both of the parts set forth the specific design and performance standards which constitute the minimum requirements for track and equipment, and also contain the requirements for inspection by the carrier of their track and equipment.

Part 216 describes the procedures for issuing a special notice for repairs or an emergency order. The former are notices issued by Government inspectors that (a) require a railroad to take the locomotive or equipment out of service because it is not in conformity with FRA's rules and is unsafe, and (b) specify the particular repairs that must be made. Such notices may also be issued for track, in which case it requires the carrier to lower the track class, and therefore operating speeds, until the specified repairs are made. The emergency order procedures contained in part 216 pertain only to track.

Parts 217 and 218 contain FRA's requirements concerning operating rules. This subject matter area is the third of the three areas (track, equipment, human factors) which the FRSA was to provide the authority to regulate. Each railroad has its own set of operating rules timetables and timetable special instructions for employees, many of which contain all of the requirements an employee must follow in performing his job (these items are referred to in the aggregate as "operating rules"). Under part 217, these rules, together with any changes that may be made from time to time, must be filed with FRA. This part also requires the railroad to conduct tests and inspections to determine employee compliance with the rules, to establish a program of instruction on the carrier's rules, and to maintain records and report to FRA concerning these tests, inspections, and instructions.

Part 218 contains the specific operating rules adopted by FRA— blue signal protection, yard speed limits, and red flag protection. Each railroad had a pre-existing rule on these areas, but FRA felt it was necessary to have a minimum Federal requirement, and thus adopted these rules after considerable review and discus-

sion by FRA's Railroad Operating Rules Advisory Committee composed of representatives of labor and management and State regulatory officials. Of a similar nature are the recently issued rules contained in Part 200 establishing standards and procedures for use of radios, which, though not technically operating rules, regulate certain employee actions in much the same manner as an operating rule. The blue signal protection rule will be discussed in greater detail below.

The remaining railroad safety rules relate primarily to particular laws as follows:

Part	Subject Matter	Law
221	Rearend marking devices	Federal Railroad Safety Authoriza tion Act (Jt 1976 (Amending FRSA)
225	Accident reports, recordkeeping investigations	Accident Reports Act
228	Reports and record-keeping with respect to ernplo yee hours of service; appendix of interpretations	Hours [>t Service Act
230	Locomotive design and performance standards	Locom(>tivc In-spection Act
231	Safety appliance stand-ards for railroad equip-ment	Safety Appliances Act
232	Requirements for power brakes and drawbars	Safety Appliance'\ Act
233-236	Requirements for signals and related devices, in-cluding reporting require-ments and procedures for obtaining approval of a system change	Signal Inspec-tion Law

Each of these parts contains, in addition to its substantive requirements, the applicable inspection, reporting, and recordkeeping requirements that formulate the system for assuring compliance. In some cases, they repeat the statutory penalty for violation of the law or regulation. However, where the law provides a penalty

range, except in the case of the regulations regarding accident reports, no indication is given as to the way in which that penalty range will be applied. Finally, it should be noted that while the law indicated above formed the primary basis of authority for the particular rule, it is usually not the exclusive basis, the FRSA being the source of authority to fill in certain gaps under the older laws. For example, part 225 looks to both the Accident Reports Act and the FRSA for the authority to require the reports and recordkeeping that are broader than that contemplated by the Accident Reports Act.

The NTSB has two sets of rules applicable to the rail environment—those pertaining to giving notice of a railroad accident (49 CFR, part 840) and those pertaining to practice and procedure in surface transportation accident hearings (49 CFR, part 845). There has been some controversy with respect to the former in that NTSB has established a different reporting threshold and required different information to be given than has FRA under its accident reports rules, although both agencies require the report to be made by telephone to the same place. While it is understandable (but not necessarily desired) that there are different reporting thresholds, there does not seem to be any good reason for different information requirements. At the least, this difference presents an unnecessary opportunity for confusion.

Having described this overall regulatory framework, some analysis needs to be given to the rules themselves and the manner in which they were formulated in order to consider their effectiveness in improving railroad safety. Since it was not feasible to conduct an in-depth examination of all of these rules within a short period of time, five subject-matter areas were selected for such an analysis: State participation regulations, tank car specifications, track safety standards, power brake rules, and blue signal protection. These were selected because they reflect different statutory sources, cover different safety hazards, reflect Government-industry-labor cooperation or lack of it, and cover different time periods.

## Analysis of Selected Regulations

The results of the analysis of **each** of the five rulemakings are discussed individually, and thereafter the conclusion concerning the rule-making process generally is set forth.

### Track Safety Standards

The track safety standards were undertaken because track was the primary area of concern in rail safety for which there was no existing Government safety program. The FRSA directed FRA to adopt “initial” standards based on “existing safety data and standards” within 1 year of the FRSA. FRA began with the track standards which were issued within 1 year, continued with freight car standards which were completed 3 years after the FRSA, and then began consideration of operating rules. The State participation regulations were also issued 3 years after the FRSA.

In the case of the track standards, it was a foregone conclusion based upon the legislative history of the FRSA that track standards were necessary for safety. Therefore, the issues raised by the rulemaking centered essentially on whether the standards FRA was preparing were based on “existing” data and standards as the FRSA required. The AAR provided FRA with its “code of track standards” and its inspection standards. While FRA acknowledged the need for its rules to be based on “existing” standards, it developed its own standards base, in part on the industry standards and in part on performance criteria it had developed. The proposed rule, a mixture of performance and design standards, was criticized by the industry as being “recommended practice” rather than safety minima, and more costly to the industry than the aggregate “benefits” they provide. The final rule contained a number of changes that reduced this criticism, and the result was a rule that has been relatively uncontroversial.

Several observations can be made from examination of this rule. First, in developing the rule, FRA worked closely with the industry but main-

tained a degree of independence that is consistent with its regulatory role. Second, the rule-making docket is devoid of any substantive treatment by FRA of most major issues. Changes were made from proposed to final rule on the basis of their being “necessary (or unnecessary) for safety.” This conclusory treatment seemed to be primarily a result of the lack of empirical data to support particular standards. Third, the rules were developed without any formal use of accident or other safety statistics, at least as reflected in the public record. Fourth, while various parties submitted at FRA’s request some rather simple cost-benefit analyses, there is no indication that FRA used that information, or any such data that it developed, in arriving at the final track standards.

### State Participation Regulations

These regulations were issued to implement the State participation program established by the FRSA. The record on the issuance of these rules indicates a basic philosophical difference between FRA and most States on this program. FRA’s approach is one of assuring uniform inspection/quality and uniform application of its rules. The States’ approach was that the FRSA had created a “right” to participate in the Federal safety program and FRA’s stringent requirements for certification and inspector qualifications deprived many States of this “right.” The railroads supported FRA’s position concerning the need for qualified inspectors. FRA amended these rules in 1975 to permit use of trainee inspectors under certain circumstances in order to enable more States to participate. However, the basic difference in approach to this program between FRA and the States has not been bridged.

The record of this rulemaking also attests to the independence of FRA in promulgating its rules, notwithstanding the fact that it provided the most interested party, the National Association of Regulatory Utility Commissioners, with a copy of the proposed rules in advance of their publication. It also indicates that a cost-benefit analysis of the rules requirements was not per-

formed. Finally, the rule proceeded from initiation to final action in a relatively short period of time (8 months) owing in part to the limited number of interested parties and to the nontechnical nature of its content.

### Blue Signal Protection

FRA instituted rulemaking action on this operating rule with an advance notice of proposed rulemaking in January 1974. In so doing, FRA was beginning to deal with the third major area of safety hazards—human factors or employee failure. FRA chose blue signal protection because it believed there was very uneven application of the industry rule, known as rule 26, among various railroads and in some cases within a particular railroad, with respect to providing blue signal protection for employees working on, under or between railcars. The result was, according to FRA, confusion and uncertainty and a lack of strict enforcement which can, it felt, lead to tragic consequences. However, the record does not indicate any statistical or safety data basis for undertaking this rule. In response to the Advanced Notice of Proposed Rulemaking (ANPRM), the AAR contended that the existing rule, which had been the industry standard since 1887, was more than adequate, had the flexibility to meet varying situations, and had a good accident history. The labor unions urged FRA to adopt a uniform national rule, rather than a minimum standard that could be supplemented by each railroad to meet its needs, and to provide for locking of switches lined against movement on a track on which a blue signal is displayed.

Eighteen months after issuing the ANPRM, FRA issued a proposed rule, and 9 months later issued the final rule on March 8, 1976. The entire rulemaking record to that point is devoid of any consideration of the costs or benefits or inflationary impact analyses. In handling the various issues, FRA seems to have opted for strong minimum standards, but excluded rapid transit railroads from the scope of the rule because they were operationally so different from other railroads. While locking of switches

was raised in response to the ANPRM, the docket of the rule does not indicate that it was not raised in response to the Notice of Proposed Rulemaking except with respect to remotely controlled switches in yards, which FRA did require to be locked. Nevertheless, after the rule was final, Congress mandated a revised rule requiring the lining and locking of switches that provided access to track on which a blue signal is displayed.

This revised rule was adopted on January 5, 1977. FRA estimated the costs of the rule to be \$9.6 million per year and \$450,000 at the outset. Within the constraints placed by Congress, FRA seems to have considered what were the least-costly alternatives. Nevertheless, there has never been any attempt to assess whether the net benefits provided by the rule, particularly the requirements for locking and lining of switches, are in reasonable proportion to the costs of compliance.

### **Power Brake Rules**

As has been discussed above, the FRA rules for installation, inspection, maintenance, and repair of power or train brakes are those established by the AAR as of 1958, and the statute permits amendment of those rules “solely for the purpose of achieving safety” (45 U.S. C. 9). The legislative history of this limitation shows that it was compromise language intended to prevent changes in the power brake rules that would have the effect of limiting the length of trains.

From 1969 to 1971, five changes to the power brake rules were proposed or considered by FRA, primarily at the behest of the industry. Rail labor strongly opposed each of these changes, contending that they were primarily for the purpose of providing the railroads with certain economic savings and could have the effect of reducing safety. However, this position was rejected both by FRA and by the U.S. District Court in a case seeking to overturn one of the changes adopted by FRA. The court found there was evidence that certain changes in the testing requirements would increase safety and sustained the rule. (*United Transportation*

*Union, et al., v. United States, et al.*, 337 F. Supp. 410, *aff'd* 406 U.S. 964 (1972)). FRA ultimately did not adopt several of the proposed changes because it found there was not “sufficient supportive data regarding the impact its adoption would have upon safety” and thus would not meet the statutory test (41 FR 56678, December 29, 1976).

This finding points up the real problem presented by the power brake law: it eliminates any opportunity to change a rule where there is not clear evidence that the change will at least not reduce safety. Such a limitation undercuts completely the usually desirable practice for an agency to review its rules and revise them to eliminate requirements whose burdens exceed substantially the benefits they provide. There is a substantial body of opinion, most of it coming from representatives of railroad management, that some of the power brake inspection rules are make-work provisions that have little or no real impact on safety but have a substantial impact on the efficiency of rail operation. If this were true (and this study has not established that it is), FRA is handicapped in enacting changes that would reduce or eliminate ineffective rules unless there were offsetting changes that would increase safety. For example, it could not eliminate a frivolous test required by the rules at some intermediate point on a train’s route unless there were other inspection or testing requirements that could be added which would offset any reduction in safety caused by that elimination. This was the procedure employed in the change which eliminated the requirement of air brake testing on run-through and unit run-through trains at the point of interchange. In other words, FRA is prevented from eliminating power brake rule requirements that, on the basis of today’s cost-benefit analysis, it would not adopt unless it at the same time enacts other safety requirements, resulting in a rule which is as equally restrictive as the original rule from a safety viewpoint. It is not clear why power brake rules have been saddled with such inflexibility, and elimination of this statutory limitation would offer a valuable opportunity for FRA to reassess these rules in the light of current safety hazards and operating practices.

## Tank Car Specifications

The revisions to the tank car specifications were undertaken in response to a petition made by five tank car builders and to a series of recent accidents involving pressure tank cars transporting hazardous materials. Among the five rules reviewed in depth, this alone forms a model for exercise of rulemaking authority. First, the record indicates a review of safety data to formulate the regulatory objective. Second, the substance of the rule was developed by industry and Government cooperation through the Railroad Tank Car Safety Research and Test Project Committee. In particular, many of the technical considerations were worked out as a result of joint or compatible research. Third, there was a relatively short time period between the petition for rulemaking (March 15, 1976), the issuance of the proposed rule (November 19, 1976), and the issuance of the final rule (September 15, 1977). Nevertheless, that time period might have been substantially shorter had not the review of the final rule been encumbered by a change in top DOT officers requiring much reconsideration and delay due to reorganization. Fourth, a cost-benefit analysis was performed for both the proposed and final rules and was made available for comment. While one can take issue with the details of this analysis, particularly in evaluating the benefits, it is clear that the significant economic issues were considered. Finally, the preambles to the final rule discuss each of the major issues raised by commenters on the proposed rule and provide some discussion of how these issues were resolved. Of course, even though this rulemaking was done carefully, it is not issue-free, as indicated by the fact that at least five petitions for reconsideration have been filed since the final rule.

In sum, a review of these rulemaking actions indicates that FRA has generally been quite balanced in its formulation of rules, responding to both the industry's economic concerns and labor's safety concerns. However, it has, at least until very recently, done little to evaluate the

impact of its rulemaking in cost or benefit terms. Further, it provides very little justification for its resolution of issues raised during the proceeding. In particular, it has seldom indicated that any of the safety information it receives or the statistics it develops are used in making decisions on whether and how to regulate a particular safety hazard. In several instances, it also has acted slowly in taking up or completing rulemaking actions, although the causes for those delays were often factors outside its control—such as the degree of controversy among interested parties and the lack of data necessary to evaluate or establish particular requirements.

On the other hand, FRA has encountered substantial statutory burdens in formulating its rules. First, in the case of blue signal protection, it was required to formulate a rule providing a protection (locking and lining of switches) that was never adequately addressed either at the initial rulemaking or subsequently in the testimony before Congress on the provision mandating the protection. The impact of such legislation is to focus the attention of the regulating agency on a particular hazard without benefit of knowing whether that hazard deserves such attention in comparison to other hazards, and to mandate a preventive measure without the benefit of being able to develop cooperatively or otherwise the least-costly alternative to reduce that hazard. Second, the standard required for amendment of power brake rules may prevent a number of changes that would make rail operations more efficient without any significant reduction in safety. This particular limitation seems in fact to be designed to prevent modernization of rules under the guise of assuring safety. Third, the FRSA requirement for a hearing on any rulemaking activity has resulted in virtually nothing in the way of new information, but rather has just been an unproductive time-consuming procedure that must be used. While the requirement was intended to provide parties with a “right” to present their views orally, it has become simply a redundancy since the parties who do participate reiterate their written comments and seldom, if ever, provide any new information.