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Policy Statement

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PROPOSED RULES

[4910-06]

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration.

[49 CFR Part 221]

[Docket No. ROS-1, Notice 3]

RAILROAD OCCUPATIONAL SAFETY AND HEALTH STANDARDS; TERMINATION

Policy Statement

AGENCY: Federal Railroad Administration, DOT.

ACTION: Termination of rulemaking proceeding and issuance of policy statement.

SUMMARY: The Federal Railroad Administration (FRA) is withdrawing its notice of proposed rulemaking with respect to railroad occupational safety and health standards. FRA had determined that it should not attempt to regulate at this time in an area already covered by regulations issued by the Department of Labor (Labor). This termination notice also explains the respective jurisdiction of FRA and Labor in a policy statement.

EFFECTIVE DATE: This termination is effective March 14, 1978.

FOR FURTHER INFORMATION CONTACT: Grady Cothen, Jr., Office of the Chief Counsel, Federal Railroad Administration, Washington, D.C., 202-426-8285.

SUPPLEMENTARY INFORMATION:

On July 15, 1976, the Federal Railroad Administration (FRA) published a notice of proposed rulemaking (41 FR 29153) concerning the issuance of railroad occupational safety and health standards under the authority of the Federal Railroad Safety Act of 1970 (84 Stat 971; 45 U. S. C. 421 et seq.). The specific standards proposed in that proceeding, designated as Docket No. ROS-1, concerned means of egress from buildings and structures, general environmental controls and fire protection. The requirements of the proposed standards corresponded generally to those contained in subparts E, J and L of the Occupational Safety and Health Standards (29 CFR Part 1910) issued by the Occupational Safety and Health Administration of the Department of Labor (OSHA/DOL). After reviewing the comments submitted to this Docket, and on reconsideration of the proper role for FRA in the general areas of occupational safety and health, the FRA has determined that the proposed standards should not be issued and that the proceeding in Docket No. ROS-1 should be terminated. This document terminates the rulemaking proceeding and issues a policy statement concerning the relationship between the respective jurisdictions of FRA and OSHA.

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On December 29, 1970, the Congress enacted the Occupational Safety and Health Act at 1910 (“OSH Act”). The purpose of that legislation was to assure safe and healthful working conditions for every working man and woman in the Nation. Under the terms of the OSH Act, every employer engaged in a business affecting commerce has a general duty to furnish each of his employees employment and places of employment free from recognized hazards causing, or likely to cause, death or serious physical harm. In addition, employers are required to comply with all safety and health standards promulgated under the OSH Act that are applicable to working conditions involved in their businesses.

Administration of the OSH Act is vested primarily in the Secretary of Labor who is responsible for promulgating and enforcing occupational safety and health standards. During the initial two year period after the effective date of the OSH Act the Secretary of Labor was directed to promulgate, as Federal occupational safety and health standards, any national consensus standard and any established Federal standard designed to assure the safety or health of employees. In addition, he was given authority to promulgate, modify or revoke any standard. This statutory scheme has led to an extensive compilation of occupational safety and health standards, some of which apply generally to all employees, while others apply only to employees engaged in certain types of work.

While the OSH Act has created, for the Secretary of Labor, a broad, general authority to regulate working conditions that affect the occupational safety and health of employees, it also recognized the existence of similar authority in other Federal agencies. Section 4(b)(1) of the OSH Act provides that the OSH Act shall not apply to working conditions as to which another Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health..

The FRA has long been involved in and concerned with assuring that railroad employees, shippers and the general public are provided with safe transportation by rail. This involvement dates back to the late nineteenth century when FRA’s predecessor agency, the Interstate Commerce Commission was directed to enforce statutory provisions requiring the use of various safety appliances on railroad cars and engines for the protection of employees and travelers (45 U.S.C. 1-7) Since the enactment of that initial Statute, specific statutory authority has been created with respect to several other aspects of the railroad industry including the regulation of power brakes on railroad equipment, locomotive inspection standards, the reporting and investigation of railroad accidents, the maximum permissible hours of service of railroad employees, standards for signal systems for the control of train movements, and regulations governing the transportation of explosives and other dangerous substances by rail.

In order to further FRA’s ability to respond effectively to the contemporary safety problems and hazards existing within the railroad industry, the Congress, in 1970, enacted the Federal Railroad Safety Act (“FRSA”). The FRSA authorized the Secretary of Transportation to exercise broad and general regulatory power as he deemed necessary, in all areas of railroad safety.

Given this longstanding FRA involvement in regulatory activities concerned with assuring both safe working conditions for railroad employees and safe rail transportation of persons and property, it was obvious that the working conditions of railroad employees were subject to potential dual regulation by the Secretary of Labor

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pursuant to his OSH Act authority. In order to effect the Congressional policy reflected in section 4(b)(1) of the OSH Act, and thereby avoid unnecessary and inefficient duplication of Federal efforts in the area of railroad occupational safety and health, the FRA initiated a regulatory proceeding to develop specific FRA occupational safety and health standards which would preempt the Secretary of Labor from enforcing OSH Act standards applicable to the same working conditions. An advance notice of proposed rulemaking was published on March 7, 1975 (40 FR 10693) indicating FRA's intention to issue specific standards. A subsequent notice of proposed rulemaking published on July 15, 1976 (41 FR 29153) stated that FRA had decided to propose standards in three particular areas and to issue a comprehensive code of occupational safety and health standards specifically applicable to railroad employees. The applicability of the standards which were to be included in this code was defined on a territorial basis rather than a specific hazard basis. The standards would apply to certain enumerated railroad workplaces, properties, facilities, structures, and equipment. Because of the complexity and magnitude of such an undertaking, it was anticipated that this code would be issued in an incremental fashion through several successive rulemaking proceedings. As with the initial specific three areas of regulation, the proposed FRA rules would be similar to those contained in several subparts of the OSHA standards.

Written comments in response to this proposal were received, and a public hearing was conducted. The FRA has reviewed not only these comments, but also the entire original concept as to the adoption of a comprehensive code of occupational safety and health standards for the railroad industry paralleling the existing OSHA regulations.

While the FRA is vested with broad authority in all areas of railroad safety, including those of an occupational nature, we believe it is important to determine the extent to which that authority can and should be exercised in order to assure an effective and coherent overall railroad safety program. To date, the majority of our efforts to assure continuing safety or to improve the present level of railroad safety has been concentrated in those areas of the railroad industry that are directly related to railroad operations—that is, the provision of a transportation service by rail. This is reflected throughout the existing FRA regulations which can be classified generally as those related to (1) track, roadbed, and associated devices and structures, (2) equipment and (3) human factors.

In these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government's efforts to assure safe employment and places of employment for railroad employees engaged in activities related to railroad operations. We, therefore, believe that FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have

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special competence.

In light of this reassessment of the proper regulatory policy for FRA to pursue in the area of occupational safety and health, FRA has decided to terminate the proceeding initiated in Docket No. ROS-1, and not to Issue FRA Railroad Occupational Safety and Health Standards concerning means of egress from buildings and structures, general environmental controls and fire protection. Nor does FRA presently plan to issue any other occupational safety and health standards concerning problems outside of the general area of railroad operations.

While the primary purpose of this notice is to inform all interested parties of the FRA's determination to terminate this rulemaking proceeding, the FRA believes that a more explicit discussion of the implications of this determination with respect to the existing jurisdictions of FRA and OSHA and the policy which will be utilized to guide future FRA actions in the occupational safety and health area is both necessary and in the public interest. It is hoped that this discussion will assist the courts and the Occupational Safety and Health Review Commission in understanding the extent to which FRA has exercised its statutory jurisdiction, the shape and organic nature of the FRA regulatory program, and the complementary role of OSHA in promoting safe and healthful working conditions for railroad employees.

POLICY CONCERNING EXERCISE OF STATUTORY AUTHORITY

A. INTRODUCTION

This policy statement will enumerate: (1) Those categories of working conditions and associated hazards with respect to which the agency is presently exercising its authority through the application of published standards or other mechanisms; (2) those working conditions and associated hazards with respect to which the agency has determined that regulation by FRA is not appropriate at this time but which are so related to regulated conditions as to require close coordination with OSHA and (3) other working conditions and associated hazards with respect to which FRA has no present plans to exercise jurisdiction. The purposes of this statement of policy are to assure the integrity of the regulatory program currently in place for the promotion of rail transportation safety by articulating its dimensions and to clarify the respective roles of FRA and OSHA in assuring the occupational safety and health of railroad employee.

This document addresses jurisdictional issues arising with respect to the operations of common carriers in the general system of rail transportation, wherever those operations may extend (including industrial sidings). It is not intended to address railroads which are not in the general system, since FRA's exercise of substantive jurisdiction over such railroads has been somewhat limited.

As is reflected by the termination notice set forth above, FRA has decided to focus its resources and energies for, the immediate future on the safety of railroad operations. As used herein, "railroad operations" refers to the movement of equipment over the rails. The term "safety" includes health-related aspects of railroad safety to the extent such considerations are integrally related to operational safety hazards or measures taken to abate such hazards. The term "safety of railroad operations," then, relates to the conditions and procedures necessary to achieve the safe movement of equipment over

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the rails. For instance, the safety of railroad operations requires that track forces engaged in laying or repairing welded rail observe certain procedures impacting on the final condition of the track and assure that geometric and other standards are met (see 49 CFR Part 213). Similarly, proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations. On the other hand, most hazards related to the handling of welding apparatus are non-operational concerns.

FRA will continue to administer a comprehensive system of accident/incident reporting for all events bearing on the safety or health of employees involved in any aspect of the rail transportation business (49 CFR Part 225). FRA will thereby monitor the possible need for rulemaking or other regulatory activities related either to occupational health or to the safety of railroad working conditions not directly associated with the movement of cars or locomotives, as such. In addition, FRA will continue its existing practice of making all accident/incident data available to OSHA for use in its complementary program of regulation.

The Occupational Safety and Health Review Commission (OSHRC) has recognized that the railroad industry is subject to the FRA accident/incident reporting requirements and is, therefore, not subject to equivalent OSHA rules. *Southern Pacific Transportation Company* 2 OSHC 1313 (OSAHRC Docket No. 1348, 1974).

FRA regulation of railroad safety under statutes which FRA administers consists of numerous elements designed to promote the safe transportation of persons and property over the nation's railroads. Implicit in each major area of regulation is the threefold objective of protecting passengers, persons along the right-of-way, and railroad employees. Protection of the public generally and employees in particular is, of necessity, an integrated undertaking. As a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property. Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and preexisting regulations.

With the enactment of the Federal Railroad Safety Act of 1970, FRA embarked on an attempt to supplement existing provisions of law and regulation and to achieve a consistent and comprehensive regulatory program. In pursuing its mission, FRA has been aware of the fact that discretion was given to the Secretary of Transportation to facilitate the consideration of existing safety data and standards (45 U.S.C. 431(d)) and to permit appropriate research, development, testing and training (45 U.S.C. 437(a)). The Secretary is directed to prescribe, "as necessary," "appropriate" rules for all areas of railroad safety (45 U.S.C. 431(a)). Regulation for its own sake is disfavored. The Secretary is charged with regulating only where there is a need which can be satisfied through Federal regulation.

There are, of course, some inherent dangers in the movement of any means of carriage (e.g., airplane, truck, barge, train). Enlightened regulation involves both a concerted effort to reduce risks and a recognition that, unless all commerce is to cease, certain risks can be guarded against only by the alertness and discipline of individuals. Both OSHA and FRA seek to assure workplaces are as safe as possible. To that end the

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Ninety-First Congress enacted both the OSH Act and the Federal Railroad Safety Act of 1970. Within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible.

B. EXERCISE OF FRA JURISDICTION OVER RAILROAD OPERATIONS

The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest. Should it be demonstrated that further specific regulatory action is required prior to the completion of an FRA rulemaking addressing a given class of hazards within one of the three major fields, FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems.

Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations. The following discussion will describe the dimensions of the three regulatory fields presently occupied by FRA. In addition, the regulation of employee sleeping quarters and transportation of hazardous materials are discussed as separate problem areas. The discussion is designed to be illustrative rather than exhaustive.

TRACK, ROADBED AND ASSOCIATED STRUCTURES AND DEVICES

The FRA Track Safety Standards (49 CFR Part 213) prescribe geometric and other technical standards for track structures and roadbed and require a program of inspections. While standards have not been issued related to the dimensions or structural integrity of bridges, tunnels, or other similar structures, FRA is exercising its authority with respect to the operational safety of such structures through inspections in response to specific requests and may undertake rulemaking proceedings at a future date. FRA has affirmatively determined that issuance of Federal regulations governing walkways on bridges is not warranted based on the projected cost of installation and the collateral safety problems which would be created (42 FR 22184; May 2, 1977).

FRA administers and enforces the Signal Inspection Act (49 U.S.C. 26), which provides the agency plenary authority over the installation, modification, inspection and maintenance, of all signal systems and related systems and appliances. FRA has issued regulations concerning false proceed reporting (41 CFR Part 233), applications for the discontinuance or modification of systems (49 CFR Part 235), and general inspection and maintenance standards (49 CFR Part 236).

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EQUIPMENT

FRA administers and enforces the Safety Appliance Acts (45 U.S.C. 1-16), which were first enacted in 1893. These statutes, which are among the earliest Federal enactments bearing on occupational safety, require certain appliances such as automatic couplers, secure grab irons, and power brakes on all cars and locomotives. FRA and its predecessor agency have implemented these statutes with regulations detailing how safety appliances shall be designed and affixed (49 CFR Part 231) and prescribing inspection and maintenance standards for power brakes (49 CFR Part 232).

FRA is also responsible for carrying out the responsibilities of the Secretary under the Locomotive Inspection Act (45 U.S.C. 22-34). This statute requires that locomotives and appurtenances thereto be safe and suitable for the service to which they are put. FRA exercises its authority under the law by enforcing extensive regulations (49 CFR Part 230) and by removing unsafe locomotives from service (49 CFR Part 216).

The Freight Car Safety Standards (49 CFR Part 215) are detailed regulations concerning the proper maintenance and inspection of freight cars which were issued in 1973 under the Federal Railroad Safety Act of 1970. Specific regulations have also been issued requiring rear end marking devices on freight and passenger trains (42 FR 2321; January 11, 1977). Public comment has been requested on the need for improved glazing materials in windows of locomotive cabs, passenger cars, and cabooses (42 FR 13309; March 19, 1977). FRA may, in the future, prescribe additional safety standards for railroad caboose cars (see FR 19359; April 13, 1977) and passenger cars. In the meantime, FRA will exercise its authority over the safe use of such cars in railroad operations through its emergency powers and special proceedings, as may be necessary in the judgment of the Administrator.

HUMAN FACTORS

The control of human factors which impact on the safety of railroad operations is the most complex and difficult of the three regulatory fields which are being addressed under the Federal Railroad Safety Act of 1970. However, FRA, with the cooperation of interested parties, has made major strides in addressing the most serious areas of concern related to this facet of railroad operations. A broad survey of railroad operating rules and practices (including employee training and testing) has been initiated through mandatory filing of specified information; and railroads have been required to conduct programs of instruction, operational tests, and inspections to enforce compliance with their own safety rules (49 CFR Part 217). Initial uniform operating rules pertaining to the protection of employees working between or under rolling equipment, operations within yard limits, and rear flag protection have now been issued (49 CFR Part 218). See 42 FR 2318; January 11, 1977, and 42 FR 5059; January 27, 1977. Procedures governing the use of radio communications and rules governing the issuance of train orders by radio have also been adopted (49 CFR part 220, issued at 42 FR 5065; January 27, 1977).

FRA also administers and enforces the Hours of Service Act (45 U.S.C. 61- 64b), which limits the hours of service at certain major categories of employees who are engaged in or connected with railroad operations (See discussion below on Employee

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Sleeping Quarters.)

Again, FRA will continue to study the need for further rulemaking in the field of human factors. In the meantime, FRA will continue to exercise its authority over railroad operations by enforcing standards already published, by utilizing its emergency powers, by promoting adherence to carrier safety rules, and by instituting any special proceedings which may be deemed necessary. As the primary regulatory agency in the area of railroad operations, it will be the responsibility of FRA to evaluate what further Federal action may be required

EMPLOYEE SLEEPING QUARTERS

Section 2(a)(3) of the Hours of Service Act (45 U.S.C. 62(a)(3)) makes it unlawful for any railroad to provide sleeping quarters for employees covered by the Act which are “not clean, safe, and sanitary” or which do not provide an opportunity for rest free from interruptions caused by noise within the control of the railroad. As the agency charged by statute and delegation with administering the Act, FRA necessarily exercises its authority over facilities covered by the statute with respect to safety hazards caused both by railroad operations and by conditions common to dormitory facilities in general. In addition, agency enforcement of the provision as it relates to cleanliness and sanitation constitutes an exercise of authority with respect to occupational health issues. In exercising its authority, FRA draws on its own expertise and that of other Federal agencies.

It should be noted that the Hours of Service Act does not apply to sleeping quarters provided for employees who are not subject to the Act. Therefore, OSHA has jurisdiction over most conditions in quarters provided for maintenance-of-way employees. However, if those quarters happened to be camp or bunk cars (railroad cars outfitted as temporary lodgings), FRA and OSHA would both have a role to play. FRA would be responsible for the condition of the cars under the Safety Appliance Acts and Freight Car Safety Standards and would resolve any other issues relating to operational hazards. OSHA would be responsible for investigating and regulating allegedly deficient interior conditions of the kind which would be common to fixed facilities.

Section 2(a)(4) of the Hours of Service Act (45 U.S.C. 62(a)(4)) provides that newly constructed or reconstructed employee sleeping quarters may not be located within the immediate vicinity of switching or humping operations, as determined in accordance with rules issued by the Secretary. Acting for the Secretary, FRA presently exercises this authority through interim rules (41 FR 53028; December 3, 1976.)

DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS REGULATIONS

FRA enforces the Department’s comprehensive Hazardous Materials Regulations with respect to the carriage or shipment of hazardous materials by rail (see 49 CFR parts 171-174, 179). Those regulations contain numerous provisions which are either designed to assure the occupational safety of employees engaged in railroad operations or which have that effect.

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C. OSHA JURISDICTION

As noted above, FRA has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety such as that proposed in the NPRM would deplete energies and resources better devoted to the safety of railroad operations. If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA. In view of this situation, FRA recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by FRA in the interest of controlling predominant operational hazards.

The following survey of OSHA standards is intended to aid the railroad industry in evaluating the breadth of FRA's exercised jurisdiction by contrasting the roles of FRA and OSHA. This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will likely be required before an optimum Federal regulatory program can be achieved. All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principle.

Again, in reading this discussion it should be kept in mind that to the extent matters addressed by the OSHA regulations are connected with or relate to railroad operations and may interact with or create operational hazards, it may be necessary for FRA and OSHA to consult concerning the interpretation or modification of such standards. As the primary regulatory agency concerned with railroad safety, FRA will not hesitate to adopt its own standards to assure a safe environment for railroad operations and to promote regulatory consistency.

GENERAL INDUSTRY STANDARDS

The areas discussed below correspond to subparts in the Occupational Safety and Health Standards (29 CFR Part 1910). FRA is aware that OSHA has proposed revocation of certain of these standards (42 FR 62734; December 13, 1977). However, since it is not possible to project at this time what final action OSHA might take with respect to individual provisions, this discussion addresses the OSHA regulations currently in effect.

WALKING-WORKING SURFACES (SUBPART D)

OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.

Second, as the agency which has exercised-jurisdiction over railroad operations, FRA

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is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, may be necessary in this area in light of overall safety considerations.

Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, catenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs. It should be noted that FRA and its predecessor agency have traditionally required the correction of defective ladders and walkways on signal structures under the authority of the Signal Inspection Act (49 U.S.C. 26(e)). Further, the FRA Track Safety Standards require the control of vegetation growth immediately adjacent to roadbed which might interfere with employees performing normal trackside duties (49 CFR §213.37). FRA will not hesitate to use its emergency powers to achieve the correction of other, similar problems.

MEANS OF EGRESS (SUBPART E)

By their own terms, OSHA regulations concerning egress do not apply to rolling equipment. However, the regulations do apply to the extent of the regulatory language to fixed railroad facilities other than employee sleeping quarters covered by the Hours of Service Act, as amended.

POWERED PLATFORMS, MANLIFTS, AND VEHICLE-MOUNTED WORK PLATFORMS (SUBPART F)

OSHA regulations apply according to their terms to the railroad industry. A work platform would be regulated by OSHA even if mounted on an on-track vehicle. It should be noted the OSHA regulation does not apply to the vehicle on which such a platform is mounted. See 29 CFR § 1910.67(b)(3). FRA is responsible for all vehicles that are utilized on track during the period of such usage. However, FRA will work with OSHA, if appropriate, to assure that both transportation and industrial hazards are adequately addressed. (See discussion under "Materials Handling," below.)

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OCCUPATIONAL HEALTH AND ENVIRONMENTAL CONTROL (SUBPART G)

These rules impose certain standards related to ventilation, occupational noise exposure, and radiation. The rules apply according to their own terms in the railroad industry, with the following exceptions.

First, the OSHA ventilation standards (29 CFR § 1910.94) do not contain any provisions which address hazards growing out of railroad operations, as such. By their terms, they have no application to locomotive cab or caboos environments, to passenger equipment, or to operational situations in yards or along the right-of-way.

Second, FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations. FRA's exercise of jurisdiction in this area is evidenced, in part, by the issuance of noise compliance regulations (42 FR 42343; August 23, 1977, issuing 49 CFR Part 210) which will be utilized by FRA to enforce the Environmental Protection Agency (EPA) Railroad Noise Emission Standards (40 CFR Part 201). In addition, locomotive cab noise affecting the ability of crew members to perform their functions as a result of impaired hearing would contravene the Locomotive Inspection Act (45 U.S.C. 22-34). See *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

Over the past several years, FRA and the Department of Transportation have performed extensive testing of noise conditions in locomotive cabs and cabooses. FRA is currently gathering additional data on noise levels in cabooses with a view to possible rulemaking (42 FR 19359; April 13, 1977). Any review of further remedial measures in the area of occupational noise exposure in locomotive cabs and cabooses must take into account the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers and the general public along the right-of-way. Only the primary regulatory agency in the area of railroad safety is equipped to evaluate these considerations and to fashion appropriate solutions. The same considerations apply to employees' exposure to retarder noise and other noise emanating primarily from railroad operations.

As a result of a recent court decision, EPA is developing, in consultation with FRA, standards setting limits on noise emanating from fixed equipment and facilities of interstate rail carriers, in addition to the roiling stock already covered. FRA will be enforcing these standards as well. See *Association of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977).

However, FRA believes noise exposure in shop areas and other areas where there are multiple noise sources is a qualitatively different issue, since abatement options will be more varied and noise sources will often include power tools and other industrial implements. Therefore, FRA recognizes the applicability of OSHA standards in shop areas, offices and other settings in which "industrial" noise emissions predominate or where exposure may be limited without the potential disruption of safe transportation activities.

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As suggested above, maximum permissible noise emission levels for rail equipment have already been determined by EPA in consultation with FRA. These emission levels, measured as set forth in the EPA standards, should be recognized by OSHA as establishing the parameters of "feasible administrative or engineering controls" with respect to rail equipment, including locomotives, when such equipment is situated in a railroad shop or enginehouse. See 29 CFR § 1919.95(b)(1). FRA will work with OSHA to evaluate the prudence of requiring personal protective equipment to reduce noise exposure in those settings where employees may be subjected to more serious hazards associated with railroad operations.

Pursuant to the mandate of section 2(a)(3) of the Hours of Service Act (45 U.S.C. 62(a)(3)), FRA also regulates noise exposure in the sleeping quarters of employees subject to the Act.

HAZARDOUS MATERIALS (SUBPART H)

The transportation of hazardous materials by rail is governed wholly by Department of Transportation Regulations (Chapter I, Title 49, Code of Federal Regulations). However, the OSHA regulations apply according to their terms in those circumstances where the Department of Transportation Regulations do not apply (i.e., to the use, handling and storage of hazardous substances in most work situations). To the extent working conditions may be affected by both (1) the shipment and carriage of hazardous materials and (2) the storage or use of such materials prior to their introduction into the stream of transportation, FRA will endeavor to work cooperatively with OSHA to assure the coherent and comprehensive regulation of this subject matter. *See American Airlines*, 3 OSHC 1624 (OSAHRC Docket No. 9362, 1975).

PERSONAL PROTECTIVE EQUIPMENT (SUBPART I)

OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations. For instance, OSHA could not prescribe attire designed for mandatory use of an employee while involved in uncoupling cars or operating a locomotive. Close OSHA-FRA cooperation will be required to ascertain whether requiring the use of certain protective equipment by persons working along the railroad right-of-way, without additional requirements assuring attention to rail transportation hazards, may tend to aggravate such hazards by obscuring vision or muffling the noise of approaching trains. If necessary, FRA will not hesitate to issue regulations placing conditions on the use of protective equipment in such circumstances or otherwise regulating its use.

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GENERAL ENVIRONMENTAL CONTROLS (SUBPART J)

The regulations classified by OSHA as “General Environmental Controls” relate to sanitation, temporary labor camps, color codes for marking physical hazards, and specifications for accident prevention signs and tags. The provisions concerning sanitation (29 CFR §§ 1910.141, 1910.143) generally apply to railroad work places. However, it should be noted that the regulations themselves contain certain limited exclusions for “mobile crews” and “normally unattended work locations as long as employees have transportation immediately available to nearby toilet facilities”. See 29 CFR § 1910.141(c)(1)(ii), § 1910.143(a)(1). Certain areas of FRA/OSHA jurisdictional overlap do exist. For instance, under the Locomotive Inspection Act FRA must ascertain whether a locomotive and all its appurtenances are “in proper condition and sale to operate.” In view of proposed rulemaking action by both FRA and OSHA which could affect the resolution of this issue, it will be necessary for FRA and OSHA to consult concerning the most effective means of addressing sanitation on occupied rolling equipment. See, in addition, Part 1250 of Title 21, Code of Federal Regulations (Food and Drug Administration regulations on Interstate Conveyance Sanitation).

Theoretically, OSHA standards concerning temporary labor camps (29 CFR § 1910.142) apply according to their terms to specified facilities except those subject to FRA jurisdiction under section 2(a)(3) of the Hours of Service Act (45 U.S.C. 62(a)(3)). However, the railroad Industry does not utilize temporary labor camps in the sense apparently intended by the OSHA regulation. It is not anticipated that there will be any conflict between the requirements of the two agencies. OSHA regulations establishing a color code for physical hazards (29 CFR § 1910.144) apply according to their terms to hazards other than those arising out of railroad operations. Railroads are encouraged to use the code to identify hazards arising out of railroad operations whenever practicable.

The OSHA specifications for accident prevention signs and tags do not cover safety signs designed for railroads (29 CFR § 1910.145(a)(1)).

MEDICAL AND FIRST AID (SUBPART K); FIRE PROTECTION (SUBPART L)

The OSHA regulations apply according to their terms except with respect to fire protection on roiling stock. Although FRA has not published specific “fire protection” standards denominated as such, FRA standards for locomotive inspection and maintenance contain provisions designed, in part, to prevent fires (49 CFR Part 230). The Locomotive Inspection Act (45 U.S.C. 22-34) requires FRA inspectors to make general determinations concerning whether locomotives are in “proper conditions and safe to operate In the service to which the same are put.” In addition, the FRA Freight Car Safety Standards (49 CFR Part 215) contain requirements which are designed to prevent overheated journals, historically a frequent cause of both fires and derailments. Additional study may result in the Issuance of additional specific requirements, as the need for and feasibility of such requirements are demonstrated. Again, as the primary regulatory agency exercising responsibility for railroad safety (Including the safety of employees engaged in railroads operations), FRA must make those determinations.

PROPOSED RULES

COMPRESSED GAS AND COMPRESSED AIR EQUIPMENT (SUBPART M)

The OSHA regulations apply according to their terms, except that (1) the Department of Transportation Hazardous Materials Regulations control and shipment and transportation of compressed gas and (2) use of compressed gas in the course of railroad operations falls within FRA's current exercise of jurisdiction. The OSHA regulations contain an exclusion for compressed air machinery used on transportation vehicles (29 CFR § 1910.169(a)(1)).

MATERIALS HANDLING AND STORAGE (SUBPART N)

The OSHA regulations apply, according to their terms, with two exceptions. First, the general requirements of 29 CFR § 1910.176 have no application to the operations of railroads in the general system of transportation by virtue of FRA's exercise of authority. The second exception pertains to locomotive cranes and other on-track vehicles which are used for maintenance of way and other purposes. Such vehicles necessarily play an important part in the safety of railroad operations. Locomotive cranes and other on-track vehicles used to haul other rail equipment are subject to the requirements of the Locomotive Inspection Act, which is enforced by FRA. The Safety Appliance Acts may also apply. (See 45 U.S.C. 8; 49 CFR §§ 231.25, 231.26.). OSHA has recognized the special problems of regulation in the railroad environment by explicitly excluding locomotive cranes used in wrecking service from the coverage of its Standards (29 CFR § 1910.180(b)(1)). Generally, the provisions of the OSHA rule are inappropriate for the railroad environment. This is an area in which consultations between the two agencies will be necessary to assure appropriate regulation of the subject matter.

MACHINERY AND MACHINE GUARDING (SUBPART O); HAND AND PORTABLE POWERED TOOLS AND OTHER HAND- USED EQUIPMENT (SUBPART P); WELD- ING, CUTTING AND BRAZING (SUBPART Q); ELECTRICAL (SUBPART S)

The OSHA regulations apply according to their terms in railroad shops and other work places, note that 29 CFR § 1910.308(c)(2) (electrical standards) excludes rail rolling stock and electrified rail systems.

TOXIC AND HAZARDOUS SUBSTANCES (SUBPART Z)

The OSHA regulations apply according to their terms, except with respect to the shipment or transportation of hazardous materials, which is controlled by the Department of Transportation Hazardous Materials Regulations, and the regulation of air contaminants in locomotive cab and caboose environments.

PROPOSED RULES

It is the judgment of FRA that the exposure of operating employees to air contaminants in the locomotive cab or caboose environment is an issue integrally related to the ability of employees to perform their duties and to the regulation of the rail equipment itself. Thus, air contaminant exposure in those particular environments must be viewed as a concern within two of the regulatory fields over which FRA has exercised jurisdiction (rail equipment, human factors). Specific FRA regulations bearing on the locomotive cab environment address cab ventilation (49 CFR § 230.229(f)(2)) and exhaust gases (49 CFR § 230.259). In addition, as noted above, the Locomotive Inspection Act prescribes a general requirement that each locomotive be safe and in proper condition. The current FRA proceeding on minimum safety standards for caboose cars includes an inquiry into the specific problem of crew exposure to air contaminants (42 FR 19359; April 13, 1977).

It should be noted that significant research has been done by FRA and other organizations concerning exposure to air contaminants in railroad operations. Additional research is ongoing. Thus far it appears that exposure levels in normal operating situations are well within the values set forth in the current OSHA standards, even in "worse-case" situations such as long railroad tunnels. See Hobbs et al., *Train Generated Air Contaminants in the Train Crew's Working Environment*, Report No. FRA/ORD-77/08 (1977). However, it is possible that situations may exist in which short-term exposure which meets OSHA standards may still affect the ability of employees properly to perform their duties and may cause serious discomfort. Therefore, FRA will continue to develop data on individual situations and may use its statutory powers to address any situation in which a carrier might decline to take voluntary remedial action.

CONSTRUCTION STANDARDS

Section 1910.12 of OSHA's General Industry standards provides that the standards contained in 29 CFR Part 1926 relating to construction work are adopted as regulations under section 6 of the OSH Act and shall apply to every "employment" engaged in construction work. "Construction work" is broadly defined to include construction, alteration, and/or repair, including painting and decorating. To the extent that hazardous construction working conditions do not fall within FRA's exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry.

PROPOSED RULES

D. CONCLUSION

The foregoing discussion of FRA's view of the proper role for it to play with respect to the railroad industry in the overall Federal occupational safety and health regulatory scheme is intended to assist all interested parties in their efforts to determine the extent to which FRA regulations and OSHA regulations will apply to working conditions within the railroad industry. As was stated earlier in this notice, the primary intent of FRA is to assure an effective and coherent railroad occupational safety and health program. We believe the policy set forth in this document will assure that each of the principal Federal agencies charged with the responsibility for carrying out this program, that is, FRA and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, cooperative efforts between the two agencies should avoid the creation of regulatory gaps on the one hand, or unnecessary duplication on the other. At any time that a hazardous working condition impacts upon the overall safety of railroad operations, FRA will take the initiative in developing a proper regulatory response.

The primary program drafter of this document is Stephen Urman of the Office of Safety. The primary legal drafters are Ann-Marie Hyland and Grady Cothen, Jr. of the Office of Chief Counsel.

AUTHORITY Sec. 202, 84 Stat. 971, 45 U.S.C. 431 and 1.49(n) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(n).

The termination contained in this notice is effective on publication.

Issued in Washington, D.C.. on March 10, 1978.

JOHN M. SULLIVAN,
Administrator.

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