MISCELLANEOUS

JURISDICTION OF ENVIRONMENTAL PROTECTION AGENCY AND OSHA OVER HAZARDOUS WASTES

Under the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 et. seq.), as amended by the Superfund Amendment and Reauthorization Act of 1986 (P.L. No. 99-499), the Environmental Protection Agency has jurisdiction over railroads where a railroad has released or threatened to release into the environment hazardous substances, pollutants or contaminants. When such an event occurs, the EPA may respond by cleaning up and removing the said substances, for which the railroad is responsible. In addition, the EPA has authority to impose fines under the said Act.

The Federal OSHA also has jurisdiction over hazardous waste operations and emergency response in the railroad industry. The OSHA regulations appear in 29 C.F.R. Part 1910. Specifically, § 1910.120 covers protection of employees involved in hazardous waste operations and emergency response. These protections include training, personal protective equipment, monitoring, materials handling, decontamination procedures, etc.1/


RAILROAD REVITALIZATION AND REGULATORY REFORM ACT

One section of the Act permits any railroad to apply for financial assistance for facilities. The Secretary of Transportation shall act upon any such application within 6 months after receipt of all required information pertinent to such application. The Secretary may approve such application if he determines that to do so would be in the public interest. Special emphasis in the application is placed on track improvement. (49 U.S.C. § 825(b)(1) (C) and (D). In making this latter determination the Secretary shall consider (a) the availability of funds from other sources, (b) the interest of the public in supplementing such other funds as may be available, and (c) the public benefit to be realized from the project to be financed in relation to the public costs of such financing. The Secretary shall give highest priority to those applications for projects which will enhance the ability of the applicant carrier to provide essential freight service. Moreover, among applications which would return equal public benefits, the Secretary shall assign highest priority to applications for assistance for providing safety improvements and signals, including underpasses and overpasses at railroad crossings at which injury or death has frequently occurred or is likely to occur.

1/ OSHA was discussed in a previous section in greater detail.
49 U.S.C. § 825(A) and (b)

**AUTHORIZING FOR INVESTIGATION AND TESTING OF SAFETY DEVICES**

The Secretary of Transportation is authorized to investigate, test, and report on the use and need of appliances or systems intended to promote the safety of railway operations. The appliances or systems to be tested may be furnished to the Secretary for that purpose free of charge to the Government. Additionally, the Secretary is authorized to employ such persons as are familiar with the subject to be investigated and tested.

49 U.S.C. § 20504

**AMTRAK DUMPING OF HUMAN WASTE**

In 1990, Congress exempted Amtrak from any federal, state or local law which would prevent the railroad from discharging human waste. In doing so, Congress required that all new inter-city rail passenger cars manufactured on or after the date of enactment of this law, shall be built to provide for the discharge of human waste only at servicing facilities. Subject to the appropriation of funds from Congress, Amtrak is required to retrofit its inter-city cars that were manufactured after May 1, 1971, that provide for the discharge of human waste either at (1) servicing facilities, or (2) along railroad right-of-way (except stations) only after the wastes have been treated. The retrofit program shall be completed within 6 years. Within 1 year of the date of enactment, Amtrak is required to submit a plan to Congress which sets forth the schedule and projected costs of completion of the retrofit program. The effective date of this legislation applies retroactively to 1976. Therefore, it attempts to exempt Amtrak from all regulatory actions relating to dumping by any governmental entity dating from 1976.

P.L. No. 101-610, § 601(a)(1)

**RAILROAD POLICE OFFICERS**

A railroad police officer who is employed by a railroad has been given the same authority to enforce the laws of any jurisdiction in which the rail carrier owns property to the same extent as a police officer properly certified or commissioned under the laws of that jurisdiction. This means that a police officer hired by the railroad has the power to arrest other railroad employees. Under the regulation adopted by FRA, the railroad must notify every state where the railroad police officers may operate.

P.L. No. 101-647, § 2205

49 C.F.R. Part 207
CLEAN AIR ACT

Clean Air Act Amendments of 1990 contained one specific provision relating to the railroads. The Environmental Protection Agency is required to issue standards for new locomotive engines within 5 years from the date of enactment to achieve the greatest possible reduction to ozone or carbon monoxide emission levels, considering cost, safety, and energy factors. The states are preempted from regulating new locomotives or new engines used in locomotives as related to emissions. (This does not correct the problem which exists with emissions from older locomotives).

P.L. No. 101-549, § 222

AMERICANS WITH DISABILITIES ACT

What is Prohibited

Employers cannot discriminate against persons with disabilities in regard to any employment practice, or any terms and conditions of employment, including job recruitment and advertising, hiring, promotion, transfer, layoff, termination, rehiring, rate of pay, job assignments, leaves of absence, fringe benefits, training and social activities. 29 CFR § 1630.4.

What is Protected

The ADA prohibits discrimination against "qualified individuals with disabilities." § 1630.4. A "qualified individual with a disability" is "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individuals holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 CFR § 1630.2 (m).

What Does "Disability" Mean under the ADA?

The term "disability" means, with respect to an individual-

(A) a physical impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment
42 U.S.C. § 12102 (2). Either one of these three prerequisites will trigger the statute.

What is a Physical Impairment That Substantially Limits a Major Life Activity?

1. What is a Physical Impairment?

Physical impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2.

The disorder or condition must relate to a diagnosable physical or mental impairment. Attempts to alleviate the disorder through medical means do not remove a person's disabled standing, such as a person with a hearing problem who alleviates the problem with a hearing aid. 29 C.F.R. Part 1630, Appendix, § 1630.2 (h). However, having a physical impairment alone does not trigger the statute, since the impairment must substantially limit a major life activity.

2. What constitutes a substantial limit on major life activities?

After the determination is made that there is a physical or mental impairment, the next test becomes whether the impairment substantially limits a major life activity. See 42 U. S. C. § 12102 (2) (a). Major life activities are fundamental actions which the average person in the general population can perform with little or no difficulty. These activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, reaching, and working. 29 C.F.R. § 1630.2(i). When one of these activities is "substantially limited" by an impairment, the statute is triggered.

What Amounts to Discrimination Under the ADA?

Once the determination is made that an individual has a protected disability, as a general rule, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Generally, the determination becomes whether the individual meets the requirements for the job, like adequate training, licenses, and skills. If the disabled individual is qualified, the employer must make a "reasonable accommodation" for the physical impairment so the individual can perform the essential job functions.

What is a Reasonable Accommodation?

If the employee is found to be qualified, but cannot perform an essential function of the job, the ADA still requires the employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate
that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112 (b) (5) (A). Moreover, the employer cannot deny "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant" 42 U.S.C. § 12112 (b) (5) (B).

The term "reasonable accommodation" includes reassignment to a vacant position. 42 U.S.C. § 12111 (a). However, an employer is not required to reassign a disabled employee where the change involves a promotion or bumping another employee out of a position to create a vacancy for the individual with the disability. See 49 C.F.R., Part 1630, Appendix, § 1630.2 (o). Eckles v. Conrail, et. al., 94 F.3d 1041 (7th Cir. 1996), cert. denied March 24, 1997.

42 U.S.C. § 12101
29 C.F.R. Part 1630

FEDERAL HIGHWAY ADMINISTRATION REGULATIONS COVERING HEALTH QUALIFICATIONS AND TESTS FOR DRIVERS OF RAILROAD OWNED TRUCKS

Under regulations of the Federal Highway Administration, a railroad worker who drives a motor vehicle for the carrier, must meet minimum physical qualifications in addition to a written exam, road test, and have an acceptable driving record. This includes an extensive annual medical physical exam. Part of the requirements allow the railroads to impose an alcohol and drug test on the employee.

The motor vehicles covered by this part include only those having a gross weight, including its load, of more than 10,000 pounds.

49 C.F.R. Part 391

EXECUTIVE ORDER 12866: REGULATORY PLANNING AND REVIEW

A. Regulatory Philosophy and Principles. The executive order sets forth a statement containing regulatory philosophy and principles to which agency should adhere.

B. Review of Existing Regulations. Agencies are required to submit to the Office of Management Budget a program for periodic review of existing significant regulations to determine whether to modify or eliminate them. Rules to be reviewed must be included in the agency’s Plan. Agencies must also
identify legislatively mandated regulations that are unnecessary or outdated.

C. **Public Participation.** Before issuing an NPRM, agencies are encouraged to seek involvement of those intended to benefit or be burdened. Agencies should provide a meaningful opportunity to comment, including a 60-day comment period in most cases. Where appropriate, agencies must use consensual mechanisms.

D. **OMB Review.** All significant rulemakings must be submitted to OMB for review before issuance. Time frames for completion of such review are established in the Order.

E. **Assessment of Economically Significant Rulemakings.** Agencies are required to prepare an assessment, including analyses, of benefits and costs, quantified to the extent feasible, of the anticipated action and potentially effective and reasonable feasible alternatives, including an explanation of why the planned action is preferable.

F. **Disclosure of Contacts.** Procedures are established for disclosure of communications with people outside of the executive branch.

**DOT ORDER 2100.5: REGULATORY POLICIES AND PROCEDURES (1979)**

A. **Coverage.** This order applies to all DOT rulemakings, including those that establish conditions for financial assistance, but excludes formal rulemakings and those related to military or foreign affairs functions, agency management or personnel, and Federal procurement. Special provisions are also made for “emergency” rulemakings.

B. **Objectives.** It sets forth objectives for DOT rulemaking (e.g., necessity, clarity).

C. **Regulations Council.** It establishes a Department Regulations Council, chaired by the Deputy Secretary, vice-chaired by the General Counsel, and made up of the heads of the Secretary of Transportation offices and the operating administrations. The Council can review and make recommendations concerning regulatory review programs (see ¶ G), significant rulemakings (see ¶ E), and the Regulatory Policies and Procedures. It can also set up task forces or require studies if necessary.

D. **Initiating Office Responsibilities.** It establishes responsibilities for the offices initiating regulations to do such things as coordinate their proposals with other operating administrations within the Department.

E. **Significant Rulemaking Review.** It requires the submission of all significant rulemakings to the Office of the Secretary for approval by the
Secretary. (A significant regulation is essentially one that is costly or controversial.)

F. **Economic Analyses.** It requires an economic analysis for all proposed (including ANPRMs) and final rulemaking actions, not just for major (very costly) rulemakings. For major rulemakings, the document is a “Regulatory Analysis”; for non-major, it is a “Regulatory Evaluation.” Where the impact is so minimal that a full Evaluation is not warranted, a statement to that effect and the basis for it is included in the rulemaking document.

G. **Reviews.** It requires the periodic review of existing regulations to determine whether they should be revised or revoked.

H. **Public Participation.** It sets forth some specific procedures to ensure a full opportunity for public participation; for example, it provides for a comment period of at least 45 days on nonsignificant regulations and 60 days on significant regulations, unless the rulemaking document states the reasons for a shorter time period. It also requires that, to the maximum extent possible, even when not statutorily mandated, opportunity for the public to comment on proposed rules should be provided, if it could be expected to result in useful information.

I. **Agenda.** It requires the development and issuance of a semi-annual regulations agenda.

**DOT ORDER 2100.2: PUBLIC CONTACTS IN RULEMAKING (1970)**

The Order essentially discourages oral communications from the time just prior to the issuance of a notice until the time the final rule is issued. If such contacts occur, they must be summarized in writing and placed in the public rulemaking docket. (If the contact occurs before the issuance of the NPRM, it may be summarized in the preamble to the NPRM).

**RAIL SAFETY ADVISORY COMMITTEE**

Under the Federal Advisory Committee Act, agencies are given the authority to create advisory committees to make recommendations for proposed regulations. The FRA, under that Act, on March 25, 1996, created the Rail Safety Advisory Committee. It is comprised of 48 representatives from 27 organizations. Rail labor and rail management have equal numbers of members on the RSAC. It will operate by negotiating a consensus on any particular safety subject matter that is delegated to it by the administrator. Unless all the members of RSAC agree to a particular task, it will not be considered by RSAC nor will it become a recommendation. However, in all cases where a working group established by RSAC unanimously agree to a particular rule, it will be automatically forwarded to the FRA for consideration, even if there is no unanimous consent by the full RSAC.
SUMMARY OF THE SWIFT RAIL DEVELOPMENT ACT OF 1994

1. The Authorization for Appropriations

Funds are authorized for 4 fiscal years (instead of 2 as has been the case since 1970).

2. Hours of Service Pilot Project

The railroads and all labor organizations representing any class or craft of directly affected covered service employees may jointly petition the Secretary for approval of a waiver of the Hours of Service Act requirements for the purpose of establishing one or more pilot projects to demonstrate alternatives to existing requirements, including maximum on-duty and minimum off-duty periods.

By January 1, 1997 FRA is required to report to Congress as to the effectiveness of the pilot projects and to recommend appropriate legislation for changes in the law.

3. Biennial Reporting

FRA's annual reporting requirements will be extended to a 2 year requirement.

4. Report on Bridge Displacement Detection

The Secretary is required to issue a report within 18 months concerning action that has been taken with regard to railroad bridge displacement detection systems.

5. Track Safety

In issuing track safety regulations, September 1, 1995 FRA is required to cover cold weather installation of continuous welded rail, and to consider whether or not to issue regulations that relate to the problem of track shelling in the detection of internal rail defects.

6. Residence of Amtrak Employees

In 1990 Congress prohibited an employee to be taxed by any state or local jurisdiction except where the employee resides. This change provides that the 1990 amendment applies to all periods of time before and after that enactment.

7. Institute for Railroad Safety

The Secretary, within one year, in conjunction with a university or college, shall create an Institute for Railroad Safety. The Institute shall research, develop, fund, and test measures to reduce rail fatalities and injuries. One Million dollars are authorized for FY 1996 through 2000.

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2/ This statute is summarized only to show that the FRA still has not promulgated all of the regulations mandated by this law.
8. **Warning to Public Regarding Vandalism and Trespassing Civil Liability**

The Secretary shall encourage railroads to warn the public about potential liabilities for violation of the regulations related to vandalism of railroad signs, devices and equipment and to trespassing on the railroads.

9. **Railroad Car Visibility**

The Secretary shall review current rules with respect to rail car visibility. If it is established that enhanced rail car visibility would likely improve safety in a cost-effective manner, a rulemaking shall be initiated to acquire enhanced visibility for newly manufactured and remanufactured railcars. The Secretary shall consider at a minimum:

a. visibility from the prospective of an automobile driver;
b. whether certain rail car paint colors should be prohibited or required;
c. the use of reflective materials;
d. the visibility of lettering on rail cars;
e. the effect of any enhanced visibility measures on the health and safety of train crew members; and
f. the cost: benefit ratio of any new regulations.

Any specific requirement on any category of trains or operations may be excluded if the Secretary determines that it is in the public interest and is consistent with rail safety.

10. **FRA/OSHA Coordination**

The Secretary shall consult with the Secretary of Labor on a regular basis to assure all laws affecting working conditions for railroad employees are appropriately enforced to ensure a safe working environment for the rail industry.

11. **Positive Train Control System Report**

The Secretary shall submit a report by December 31, 1995, to the Senate and House regarding development, deployment, and demonstration of positive train control systems.

12. **Passenger Car Safety Standards**

The Secretary shall issue regulations covering passenger car safety. They shall address, at a minimum, crash-worthiness, interior features (including luggage restraints, seat belts, and exposed surfaces) that may affect passenger safety; maintenance and inspections of cars; emergency response procedures and equipment; and any operating rules and conditions that directly affect safety. Some or all of the standards shall apply to cars existing at the time of the issuance of the regulations. The initial standards shall be issued within 3 years, and final regulations shall be promulgated in 5 years.
13. **Contract and Grant Authority of the Secretary**

   The Secretary is authorized to enter into contracts which may be necessary or appropriate to carry out the functions of the FRA.

14. **Tourist Railroads**

   In prescribing regulations that cover tourist, historic, scenic, or excursion railroads, the Secretary shall take into consideration any financial, operational, or other factors unique to such carriers. A report shall be submitted to Congress on actions taken by September 30, 1995.

15. **Authorization for Appropriations covering Operation Lifesaver**

   Funds for Operation Lifesaver, Inc. are authorized as follows: $300,000 for FY 1995; $500,000 for FY 1996; and $750,000 for FY 1997.

16. **Railroad Trespasser and Vandalism Prevention**

   The Secretary shall evaluate current laws regarding trespassing on railroad property and vandalism, and develop a model prevention strategy enforcement law to be used by the states. The evaluation and review shall be completed in one year. Further, the Secretary shall develop an outreach program to improve communications regarding trespassing and vandalism problems on the railroads. In 18 months the Secretary shall develop and make available to the states and local governments model legislation providing penalties for vandalism and for trespassing.

17. **Emergency Notification of Grade Crossing Problems**

   The Secretary shall conduct a pilot program to demonstrate an emergency notification system utilizing a toll free telephone number for the public to use for conveying to railroads information concerning malfunctions or other safety problems at grade-crossings. The pilot program shall include crossings in at least two states; include provisions for public education and awareness; and post information at the crossings describing the emergency system and instructions on its use. The pilot program should be completed within 24 months, and a report shall be submitted to Congress not later than 30 months as to the effectiveness of such emergency notification systems.

18. **Audible Warning at Grade Crossings**

   The Secretary shall prescribe regulations requiring that a locomotive horn shall be sounded while each train is approaching and entering a grade crossing. The Secretary may except from the requirement any rail operations or categories of crossings that the Secretary determines not to present a significant risk to loss of life or injury; for which the horn warning is impractical; or there exists supplementary safety measures to fully
compensate for the absence of the locomotive horn. The "supplementary safety measures" must be an effective substitute for the locomotive horn which prevents movement over a crossing (such as adequate median barriers that prevent movement around crossing gates). The following do not constitute supplementary safety measures: Standard traffic control devices such as reflectorized crossboxes, stop signs, flashing lights, flashing with gates that do not completely block travel. Any supplementary measures must be applied to all grade crossings within a specified distance along the railroad in order to be excepted.

No such waiver or exemption may be granted unless an application is submitted jointly by the railroad carrier and by the appropriate traffic control authority or law enforcement authority. No waiver will be granted unless the application demonstrates that the safety of the highway users will not be diminished.

In order to promote the quiet of communities, the Secretary may order the railroad carriers to temporarily cease the sounding of the locomotive horns at such crossings. Prior to such approval, any such measures shall have been subject to testing and evaluation.

By regulation, the following crossings may be subject in whole or in part to the regulations regarding locomotive horns and alternative supplementary safety measures: Private grade crossings; pedestrian crossings; crossings utilized primarily by non-motorized vehicles, and other special vehicles.

The regulations under this section shall be issued not later than 24 months covering those crossings which in the judgment of the Secretary pose the greatest safety hazards. The remaining regulations to the other categories of crossings shall be issued not later than 48 months.

In the regulations which are issued, the Secretary shall include a concise statement of the impact of such regulations on the policy of Congress to have national uniformity of rail safety regulations.