warranted based on available information that indicated activities not described in the TSCA section 5(e) consent order or the PMN might result in significant changes in human or environmental exposure as described in section 5(a)(2) of TSCA. Based on these findings, SNURs were promulgated.

EPA has revoked the TSCA section 5(e) consent orders that are the basis for these SNURs and no longer finds that activities other than those described in the TSCA section 5(e) consent orders may result in significant changes in human or environmental exposure. The revocation of SNUR provisions for these substances is consistent with the findings set forth in the preamble to the proposed revocation of each individual SNUR.

Therefore, EPA is revoking the SNUR provisions for these chemical substances and will no longer require notice of intent to manufacture, import, or process these substances. In addition, export notification under section 12(b) of TSCA will no longer be required.

III. Regulatory Assessment Requirements

This rule revokes or eliminates an existing regulatory requirement and does not contain any new or amended requirements. As such, the Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''*Regulatory Planning and Review*'' (58 FR 51735, October 4, 1993).

Since this rule does not impose any requirements, it does not contain any information collections subject to approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or require any other action under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

Nor does it require any prior consultation as specified by Executive Order 12875, entitled ''*Enhancing the Intergovernmental Partnership*'' (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled ''*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*'' (59 FR 7629, February 16, 1994) or require OMB review in accordance with Executive Order 13045, entitled ''*Protection of Children from Environmental Health Risks and Safety Risks*'' (62 FR 19885, April 23, 1997).

On August 4, 1999, President Clinton issued a new executive order on *Federalism*, Executive Order 13132 (64 FR 43255, August 10, 1999). This rule will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

In addition, pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency has determined that SNUR revocations, which eliminate requirements without imposing any new ones, have no adverse economic impacts.

This rule is not subject to Executive Order 13211, ''*Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

IV. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 3, 2001.

William H. Sanders, III

Office Director, Office of Pollution Prevention and Toxics.

Therefore, 40 CFR part 721 is amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

§§ 721.3460 and 721.6820 [Removed]

2. By removing §§ 721.3460 and 721.6820.

[FR Doc. 01–30594 Filed 12–10–01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 241

[FRA Docket No. FRA–2001–8728, Notice No. 1]

RIN 2130–AB38

U.S. Locational Requirement for Dispatching of U.S. Rail Operations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Interim final rule and request for comments.

SUMMARY: This Interim Final Rule adds a new regulation that requires all dispatching of railroad operations that occur in the United States to be performed in the United States, with three minor exceptions. First, a railroad is allowed to conduct dispatching of railroad operations in the United States from a point outside the United States (''extraterritorial dispatching'') in emergency situations for the duration of the emergency if the railroad provides prompt written notification of its action to the FRA Regional Administrator of each FRA region in which the railroad operation occurs; such notification is not required before addressing the emergency situation. Second, the rule permits continued extraterritorial dispatching of the very limited track segments in the United States that were regularly being so dispatched in December 1999. This grandfathering covers the four domestic operations that are dispatched from Canada. Third, the rule would allow for extraterritorial dispatching from Canada or Mexico of fringe border operations. Such operations are acceptable provided the United States trackage being dispatched does not exceed 100 miles, each train is under the control of the same assigned crew for the entire trip over that trackage, and the rail line encompassing the trackage either both originates and terminates in either Canada or Mexico without the pick up, set out, or interchange of cars in the United States or is under the exclusive control of a single dispatching district and that portion of the line being dispatched extends no further into the United States than specified types of locations close to the border.

In addition, railroads that wish to commence additional extraterritorial dispatching may apply for a waiver under certain other provisions from the domestic locational requirement set forth in this regulation. Such a waiver may be granted if, inter alia, an

applicant can demonstrate to the satisfaction of FRA a program to assure safety oversight of the dispatching function comparable to that provided by FRA regulators for dispatchers located in the United States.

FRA is interested in receiving public comments on possible benefits and costs of this Interim Final Rule and comments on whether FRA should adopt an alternative regulatory scheme under which extraterritorial dispatching of United States railroad operations would be permitted and, if so, under what conditions. The Interim Final Rule will be in effect for a period of 365 days to provide FRA with time to analyze these comments. Based on the comments, FRA may: Issue final rule amendments to the Interim Final Rule making the Interim Final Rule permanent with any substantive changes FRA determines are appropriate; issue a notice proposing a new rule (a notice of proposed rulemaking), and possibly a final rule amendment extending the deadline of the Interim Final Rule while FRA completes this new rulemaking; or decide that no Federal regulation is appropriate and issue a final rule removing the Interim Final Rule.

DATES: (1) *Effective Date:* This regulation is effective January 10, 2002 through January 10, 2003.

(2) *Written Comments:* Written comments must be received by February 11, 2002. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(3) *Public Hearing:* FRA is planning to conduct at least one public hearing to be held in Washington, DC, in order to provide all interested parties the opportunity to comment on the provisions contained in the Interim Final Rule. FRA will issue a separate document in the **Federal Register** in the very near future to inform all interested parties as to the exact date and location where the public hearing(s) will be held.

ADDRESSES: Anyone wishing to file a comment should refer to the FRA docket and notice numbers (Docket No. FRA–2001–8728, Notice No. 1). You may submit your comments and related material by only one of the following methods:

By mail to the Docket Management System, United States Department of Transportation, room PL–401, 400 7th Street, SW., Washington, DC 20590–0001;

Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.* For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the ''Help'' menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza Level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: For technical issues related to alcohol and controlled substance matters, Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202–493–6313); or for other technical issues, Dennis Yachechak, Railroad Safety Specialist, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202–493–6260). For legal issues related to alcohol and controlled substance matters, Patricia Sun, Trial Attorney, FRA Office of the Chief Counsel, RCC–11, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202–493–6038); or for other legal issues, John Winkle, Trial Attorney, FRA Office of the Chief Counsel, RCC–12, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202–493–6067).

SUPPLEMENTARY INFORMATION:

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I. Railroad Dispatchers Are Essential to the Safety of Railroad Operations

Proper dispatching is essential for safe railroad operations. Because trains have long stopping distances, train operations are not conducted by line of sight. Rather, the route ahead must be cleared for the train's movement. Switches must be aligned properly along the route. Potentially conflicting movements must be guarded against in order to prevent collisions. Dispatchers actually ''steer'' the train by remotely aligning switches. They determine whether the train should stop or move, and if so, at what speed, by operating signals and issuing train orders and other forms of movement authority or speed restriction. In addition, dispatchers protect track gangs and other roadway workers from passing trains by issuing authorities for working limits. Train crews on board locomotives carry out the dispatchers' instructions and are responsible for actually moving the train, but dispatchers make it possible to do so safely.

FRA is aware that, depending upon the ''method of operation'' in effect on a particular territory and the availability of computer-aided dispatching (CAD) systems, electrical or electronic systems may constitute significant checks on inadvertent dispatcher error. However, the possibility for error remains within any method of operation. For instance, there are a variety of scenarios in which dispatchers can override CAD system warnings. Even in traffic control territory, where vital signal logic nominally protects against conflicting movements, roadway workers and their equipment may lack protection due to dispatcher error; and it may be necessary to issue authorities for train movements past stop signals in a variety of circumstances. Thus, a dispatcher's judgment must be sound if railroad operations are to be conducted safely.

It is commonplace in today's railroad operations for dispatchers to be located at a significant distance from the trackage and operations they control. For example, CSX Transportation, Inc, (CSX) dispatchers in Jacksonville, Florida, control the operations of CSX, Amtrak, and commuter rail trains throughout the Southeast and Mid-Atlantic. This does not create any additional safety risk. FRA does not mean to suggest, in the discussion of dispatch locational issues, that mere distance from the physical site of rail operations poses a safety hazard.

II. Potential for Location of Dispatchers outside United States Borders

Currently, dispatchers located outside the United States control only very limited train movements in the United States. Specifically, the Canadian National Railway Company (CN) uses Canadian-based dispatchers to control trains operating from Ontario, Canada, into the United States on the following trackage in the United States: 1.8 miles to Detroit, Michigan; and 3 miles to Port Huron, Michigan. CN also uses Canadian-based dispatchers located in Edmonton, Alberta, Canada, to control trains operating into Minnesota on 40 miles of track on the Sprague Subdivision, which accommodates 10 trains daily.[1] Finally, the Eastern Maine Railway Company operates track between McAdam, New Brunswick, Canada, to Brownville Junction, Maine, 99 miles of which are in the United States. Operations on this trackage are dispatched from St. John, New Brunswick, Canada. These limited rail operations do not cover any trackage that has been designated by FRA and the Military Traffic Management Command of the Department of Defense (DOD) as vital to the national defense. In addition, there is no evidence that these extremely limited operations have adversely affected safety. No dispatchers located in Mexico control railroad operations in the United States.[2]

However, there is the prospect of increased use of dispatchers located outside the United States. Specifically, CP, which owns the Delaware and Hudson Railway Company (D&H), is interested in relocating from the United States to Canada dispatching functions involving the dispatching of approximately 32 D&H trains per day operating over the 546-mile D&H system in the United States. CN's previous acquisitions of the Grand Trunk Western Railroad, Inc. (GTW) (646 miles of track operated by GTW (1998 figures)), the Illinois Central Railroad Company (2591 miles of track) and the 2,500 route miles of U.S. Class II and III railroads formerly owned by the Wisconsin Central Transportation Company raise the possibility of additional extraterritorial dispatching at some future date.[3] In addition, CP's earlier acquisition of the Soo Line Railroad Company also presents future exposure of the same kind. FRA is aware that the merged or consolidated railroads (other than CP in the case of D&H) disclaim (or are silent regarding) any current intention to transfer dispatching work outside the country. The railroads have the discretion, however, to act in their own best interests and are under no obligation to continue to refrain from extraterritorial dispatching, and those interests may change as circumstances change.

With regard to Mexico, the Texas Mexican Railroad (TM) and Transportacion Ferroviaria Mexicana (TFM) are currently exploring the feasibility of obtaining trackage rights over trackage owned by the Union Pacific Railroad Company (UP) that extends between Laredo and San Antonio and between Laredo and Houston. Finally, because of present technology, railroads operating in the United States that now dispatch their trains in the United States could dispatch these trains from anywhere in the world.

III. Dispatchers Must Comply With the Federal Railroad Safety Laws To Move Traffic Safely in the United States

As noted above, proper dispatching is essential to conducting safe railroad operations. With respect to railroad dispatchers located in the United States, Federal statutes and regulations and oversight actions by FRA, as the agency charged with administering the Federal rail safety laws, together safeguard United States railroad operations when railroad dispatchers are located in the United States. 49 U.S.C. ch. 51, 201–213; 49 CFR 1.49. Examples of safety rules and laws affecting dispatchers include operating rules and efficiency testing (49 CFR part 217), drug and alcohol testing (49 CFR part 219), and hours of service (49 U.S.C. 21105 and 49 CFR part 228). (Hereinafter, references to a numbered part are to a part in title 49 of the CFR unless otherwise stated.) To promote compliance, FRA may conduct inspections and investigations and impose sanctions for violations of its safety standards against both railroads and individuals, including dispatchers, if the individual or railroad is located in the United States. *See,* e.g., 49 U.S.C. 20107; 49 U.S.C. ch. 213; and part 209, appendix A (a description of FRA's safety enforcement program and policy). However, paragraph (c) of § 219.3 currently exempts employees of a foreign railroad, including dispatchers, whose primary reporting point is located outside of the United States and who perform service in the United States covered by the hours of service laws from subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing) of § 219.3. Drug and alcohol testing of such employees is addressed in detail in an FRA Notice of Proposed Rulemaking (NPRM) published elsewhere in the **Federal Register** today that proposes revisions to Part 219 requiring that such employees be tested. The provisions of part 241 along with the provisions of the NPRM will ensure that dispatchers controlling the bulk of rail operations in the United States are covered by effective drug and alcohol testing regulations.

Besides enforcing the Federal railroad safety laws, FRA also can take other safety-related actions. Further, FRA may conduct investigations of railroad accidents in the United States, including those involving dispatching, and may issue reports on the agency's findings, including its determination of probable cause. *See,* e.g., 49 U.S.C. 20107, 20902; 49 CFR 225.31. In addition, FRA may conduct research and development as necessary for every area of railroad safety, including dispatching. 49 U.S.C. 20108. Moreover, FRA may issue rules and orders, as necessary, for every area of railroad safety, including dispatching. *See* 49 U.S.C. 20103. Such orders may include emergency orders to eliminate or reduce an unsafe condition or practice, identified through testing, inspecting, investigation, or research, that causes an emergency situation involving a hazard of death or injury to persons. *See* 49 U.S.C. 20104. Finally, FRA has recently taken a pro-active approach in its ability to influence non-regulated aspects of dispatching operations through its Safety Assurance and Compliance Program (SACP), through its safety advisories published in the **Federal Register**, and through its visits to dispatching centers to ensure that dispatching is being safely conducted whether or not specific federal standards are being violated.

[1] Canadian railroads also operate on the following three lines from Canada into the United States without the use of a dispatcher: 1 miles to Buffalo, New York (CN); 1 mile to Niagara Falls, New York (Canadian Pacific Railway Company (CP); and 1.5 miles to Niagara Falls, New York (CN).

[2] There are currently five interchange operations between Mexican and United States railroads along the Texas-Mexico border and one on the Arizona-Mexico border involving Mexican-based train crews. These movements, however, are not controlled by a dispatcher. They are all within yard limits and are controlled by yard rules. These operations are located in Texas at Brownsville, Laredo, Eagle Pass, Presidio, and El Paso, and in Arizona at Nogales. Only the Eagle Pass operation is greater than one-fourth of a mile (length of haul on United States soil), and even that operation covers less than one mile.

[3] Likewise, although The Kansas City Southern Railway Company remains independent, it ''has entered into a comprehensive alliance with CN and IC.'' STB Ex Parte No. 582 (Sub-No. 1), advance notice of proposed rulemaking, n.7, 65 FR 18021 (April 6, 2000). ''Joint marketing arrangements enable railroads to offer joint-line service almost as seamless as single-line service * * *.'' *Id.* at n.10.

A. Hours of Service, Operating Rules and Efficiency Testing, and Drug and Alcohol Testing Requirements

Congress has established hours of service standards for safety-sensitive domestic railroad employees, including railroad dispatchers. In order to prevent fatigue which could adversely affect job performance, 49 U.S.C. 21105 mandates that dispatchers in the United States may not work more than nine hours during a 24-hour period in a location where two or more shifts are employed, or 12 hours during a 24-hour period where only one shift is employed. Part 228 requires railroads to retain written hours of service records for dispatchers and allows for access to those records by FRA inspectors.

In addition, domestic railroad dispatchers are subject to FRA safety standards. Under part 217, railroads operating in the United States are required to have operating rules, to periodically instruct employees (including dispatchers) on those rules, to periodically conduct operations tests and inspections on employees (including dispatchers) to determine the extent of their compliance with the rules, and to keep records of the individual tests and inspections for review by FRA.

Under part 219, dispatchers and other safety-sensitive railroad employees located in the United States are subject to random, reasonable suspicion, return-to-duty, follow-up, and post-accident drug and alcohol testing, as well as pre-employment testing for drugs.[4] *See* subparts B, C, D, F, and G of part 219. Post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA testing thresholds. *See* subpart C. A dispatcher found to have violated FRA's drug and alcohol rules, or who refuses to submit to testing, is required to be immediately removed from dispatching service for a nine-month period, and the railroad must follow specified procedures including return-to-duty and follow-up testing requirements before returning the dispatcher to dispatching service. *See* subpart B. Additionally, domestic-based employers must provide self-referral and co-worker reporting (self-policing) programs for their employees (subpart E), submit random alcohol and drug testing plans for approval by FRA (subpart G), conduct random testing under part 219 and DOT procedures found in part 40 (subpart H), submit annual reports (subpart I), and maintain program records (subpart J).[5]

FRA's broad-based, multi-component alcohol and drug program has reduced alcohol and drug abuse in the railroad industry since FRA's original alcohol and drug regulations were implemented in 1986.

- In 1987, testing for cause conducted under FRA and railroad programs resulted in a 4.0 percent positive rate for alcohol and a 6.9 percent positive rate for drugs. These rates have declined each year, with the 1998 testing for cause resulting in a 0.36 percent positive rate for alcohol and a 0.95 percent rate for drugs.
- Random drug testing began in 1989. The first full year's data for 1990 indicated a 1.04 percent rate, declining to a 0.77 percent rate in 1998.
- Random alcohol testing began in 1994, with the first full year's data for 1995 resulting in a 0.42 percent rate, which has declined each year to a 0.003 percent rate for 1998.

FRA post-accident testing data provide perhaps the most stark and compelling proof of the decline in alcohol and drug abuse in the railroad industry. In its post-accident testing program, in which testing is triggered only by significant accidents, FRA may use lower drug detection levels (cutoffs) and test for more substances than those tested for in other types of FRA testing. Post-accident testing data are the most scrutinized because FRA reviews each testing event, and tests each specimen in a designated contract laboratory, which FRA inspects quarterly. Furthermore, because the program has been in effect since 1987, post-accident testing data provide the longest trend line.

An analysis of the post-accident testing data in the chart below demonstrates how positive test results have dramatically declined since FRA's program started. In 1987, the first year of the program, 42 employees produced a positive specimen, resulting in a post-accident positive rate of 0.4 percent for alcohol and 5.1 percent for drugs. By 1998, only four employees produced a positive specimen, resulting in positive rates of 0.0 percent for alcohol and 2.6 percent for drugs.

As shown in the post-accident testing chart below, in each of the fields—''Qualifying Events,'' ''Employees Tested,'' and ''Employees Positive One/More Substances [Number (A=Alcohol; D=Drug)]''—FRA has achieved a desired reduction, despite a significant increase in rail traffic. The deterrent effect of random drug testing, which was implemented in 1988–1989, most certainly influenced the dramatic reduction in post-accident positives from 41 in 1988 to only 17 in 1990. Additionally, in the eight years from 1987 through 1994, there were 20 post-accident alcohol positives, but only two post-accident alcohol positives in the succeeding four years after implementation of random alcohol testing in 1994. While some refinement of regulatory requirements over the years has reduced the class of qualifying events (cost criteria for two of the qualifying events have been increased), the remaining events are those for which higher positive rates would be expected due to a higher component of likely human factor involvement.

FRA is aware that many factors have contributed to these results and probably influenced movement in both directions. The number of employees tested has decreased due to fewer qualifying events and crew consist reductions. For other than FRA post-accident testing, the Department of Health and Human Services (DHHS) has reduced the detection cut-off level for marijuana metabolites and has increased the detection levels for opiates used in Federal workplace detection programs such as FRA's. Another factor likely to have contributed to higher industry positive rates is the constant improvement in railroad random testing

[4] In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143, Congress found that—(1) Alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation;

(2) millions of the Nation's citizens utilize transportation by aircraft, railroads, trucks, and buses, and depend on the operators of aircraft, trains, trucks, and buses to perform in a safe and responsible manner;

(3) the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;

(4) the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has proven to have been a critical factor in transportation accidents;

(5) the testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing;

(6) adequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right to privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed; and

(7) rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate. 49 U.S.C. app. 1434 note. FRA's random testing regulations respond to Congress' directive in the Act (49 U.S.C. 20140) to issue random testing regulations relating to alcohol and drug use in railroad operations.

[5] For example, Subpart I requires that certain information on a railroad's tests and inspections related to enforcement of the company's rules on alcohol and drug use be reported annually to FRA for review.

programs. Nonetheless, testing data remain the best indicator of the success that the comprehensive programs mandated by FRA have had in significantly reducing alcohol and drug abuse in the railroad industry.

FRA POST-ACCIDENT TOXICOLOGICAL TESTING RESULTS (1987–1998)

Year	Qualifying events	Employees tested	Employees positive one/more substances [number (A=Alcohol; D=Drug)]
1987	179	770	42 (3A–39D)
1988	178	682	41 (3A–38D)
1989	161	607	24 (6A–18D)
1990	149	524	17 (1A–16D)
1991	157	552	8 (2A–6D)
1992	109	332	7 (1A–6D)
1993	128	403	8 (2A–6D)
1994	115	294	7 (2A–5D)
1995	82	225	2 (0A–2D)
1996	73	197	1 (0A–1D)
1997	86	240	3 (2A–1D)
1998	68	153	4 (0A–4D)

Note on this chart, concerning 49 CFR 219, subpart C—Post-Accident Toxicological Testing:

The positives reflected in the chart indicate the presence of drugs or alcohol in a covered employee during the event. A positive result does not necessarily indicate a causal relationship with the accident. Causal determinations are made only after a thorough review of all factors that may have contributed to the accident.

With certain stated exceptions, post-accident toxicological tests are required to be conducted for the following events:

1. Major Train Accident (involving damage exceeding the current FRA reporting threshold ($6,600 in 1998)) involving:

(a) A fatality;

(b) A release of hazardous material lading from railroad equipment resulting in either an evacuation or a reportable injury; or

(c) Damage to railroad property of $1,000,000 or more.

2. Impact Accident (as defined in § 219.5 involving damage exceeding the FRA reporting threshold) involving:

(a) A reportable injury; or

(b) Damage to railroad property of $150,000 or more.

3. Fatal Train Incident: fatality to any on-duty railroad employee involving movement of on-track equipment with damage not exceeding the reporting threshold.

4. Passenger Train Accident: passenger train involved in an accident that exceeds the reporting threshold and results in an injury reportable to FRA under 49 CFR part 225.

See 49 CFR 219.201(a). Rail/highway grade crossing accidents and accidents wholly resulting from natural causes (e.g., tornado), vandalism, or trespassing are exempt from FRA post-accident testing. *See* 49 CFR 219.201(b). For a major train accident, all train crewmembers must be tested, but any other covered employees (e.g., dispatchers, signalmen) determined not to have had a role in the cause or severity of the accident are not to be tested. *See* 49 CFR 219.201(c)(2).

B. FRA's Oversight and Enforcement Activities

In order to effectively promote safety in all areas of railroad operations, including dispatching, FRA has additional tools and programs at its disposal other than the strictly regulatory framework described above. FRA's SACP is an approach to safety that emphasizes the active partnership of FRA, rail labor representatives, and railroad management in identifying current safety problems and jointly developing effective solutions to those problems. One fundamental principle of this approach is tracing a safety problem to its root cause and attacking that root cause instead of its symptoms. Where a problem is determined to be system-wide, SACP allows for a system-wide approach rather than individual, uncoordinated actions. So far, SACP has demonstrated significant capacity for identifying and eliminating the root cause of system-wide rail safety problems, including dispatching-related problems, by enlisting those most directly affected by such problems—railroad employees and managers—in a partnership effort.

For example, in 1997, FRA effectively used SACP to address system-wide problems on the UP and Southern Pacific Transportation Company (SP) (collectively UP/SP) during the period that the two railroads were in the process of merging with each other.[6] Between June 22 and August 31, 1997, UP/SP experienced five major train collisions that resulted in the deaths of five UP/SP employees and two trespassers. These accidents were in addition to a series of yard switching accidents that claimed the lives of four UP/SP train service employees. On August 23, under the auspices of the SACP, FRA launched a comprehensive safety review of UP/SP's operations, including its dispatching, and in the ensuing two-week period, as many as 80 FRA and state safety inspectors were on UP/SP property to determine the magnitude and extent of safety problems and to recommend measures to address those problems. In November, following two non-fatal collisions, FRA sent a team of 87 Federal and state inspectors onto UP/SP property for one week to ensure that the safety deficiencies identified in the initial review were being dealt with at the highest levels of the organization.

As a result of the safety reviews, FRA concluded that a fundamental breakdown existed in some of the basic railroad operating procedures and practices essential to maintain a safe operation, particularly in the area of dispatching. As part of the SACP process, FRA conducted a comprehensive safety audit of UP/SP's Harriman Dispatch Center, which is the railroad's main dispatching facility and which dispatches operations on approximately 95 percent of UP/SP's territory. During the initial phase of the safety audit, FRA inspectors and safety specialists spent a total of 31 days at the dispatching center observing and analyzing UP/SP dispatching practices

[6] SP merged into UP effective February 1, 1998.

and procedures. Later, FRA inspectors headquartered within a few miles of the dispatching center made frequent follow-up visits to the dispatching center. FRA observed inefficient and unsafe practices by supervisors and dispatchers at the dispatching center, and correctly attributed those practices to inadequate training and extreme work overload. FRA made specific recommendations, which UP/SP accepted, such as creating additional dispatch positions, realigning dispatchers' territories to better balance the workload, hiring new dispatchers, tripling the number of dispatching supervisors, making improvements to the software in the UP/SP's CAD system, and forming a working group consisting of representatives from FRA, rail labor, and UP/SP management to continually monitor and address dispatching issues that may arise.[7] As a result of FRA's SACP efforts, UP/SP's safety performance recovered rapidly. During the year following FRA's dispatching initiative, UP/SP saw fatalities due to train collisions drop by 100 percent, from seven in 1997 to none in 1998. Such an immediate response could not have been effectuated without FRA's ability to obtain access to its facilities, which would not have been guaranteed if UP/SP's dispatching facilities were located outside the United States.

Another safety tool FRA has at its disposal is the safety advisory.[8] Safety advisories are issued by FRA and published in the **Federal Register** to disseminate important information on critical safety concerns. By publishing safety advisories in the **Federal Register**, FRA is able to reach the entire regulated community instead of just the railroad whose actions prompted the safety advisory. Previous safety advisories have concerned problems with train control systems, train handling procedures, equipment securement procedures, and procedures for reducing the risk of damage to tracks and bridges from flash floods. For example, on December 23, 1996, FRA published a Notice of Safety Bulletin in the **Federal Register** (61 FR 64191) addressing recommended safety practices for Direct Train Control (DTC), an umbrella term that refers to methods of operation used by dispatchers to control train movements that are known variously as Direct Traffic Control, Track Warrant Control (TWU), Track Permit Control System (TICS), and Form D Control System (DCS), and similar means of authorizing train movements. The safety bulletin was issued as a result of FRA's investigation of a head-on collision between two freight trains operated by CSX, and included three recommended safety practices for operations in DTC territory. Although railroad compliance with safety advisories is voluntary, the effectiveness of the advisories is greatly influenced by FRA's ability to determine the nature of the railroad's responsive action through on-site inspections and the ability to issue regulations and emergency orders should the railroad refuse to abide by the safety advisory.

Another safety tool FRA utilizes to promote rail safety is the site inspection, which is more closely associated with FRA's regulatory enforcement program than either SACP or safety advisories but can be an integral element in either. *See*, e.g., 49 U.S.C. 20107. Through site inspections, FRA's safety inspectors are able to observe a railroad's practices first-hand and, if warranted, write reports and recommend that civil penalties be assessed for violations. FRA frequently conducts inspections of railroad dispatching centers to monitor operating practices and dispatching procedures. As FRA's experience during the UP/SP SACP investigations demonstrates, site inspections are invaluable in investigating and addressing safety problems and can be used to quickly improve a railroad's operating practices.

These inspections may also reveal the need for an emergency order, especially if the railroad is unwilling to take corrective action. 49 U.S.C. 20104 (superseding 45 U.S.C. 432). FRA's emergency orders provide an example of the kind of dramatic action the agency takes in response to hazards discovered during routine site inspections. FRA received the statutory authority to issue emergency orders in 1970. Of the 22 emergency orders that FRA has issued since then, at least nine have been issued primarily as a result of such routine inspections (as opposed to FRA investigations of railroad accidents or other forms of inquiry).

All of these tools, both regulatory and non-regulatory, are strengthened by FRA's ability to readily gain access to railroad facilities. Such tools as SACP activities, railroad site visits, and emergency orders depend, to a significant degree, on easy access to railroad facilities. For these tools to work, FRA must be assured of such access. FRA is not certain at this time whether access can be assured outside the borders of the United States, or whether the laws of foreign countries will adequately safeguard United States rail operations. While FRA has the power to issue an emergency order under 49 U.S.C. 20104(a) against a railroad that does not have in place a program imposing adequate safety requirements for extraterritorial persons that dispatch domestic railroad operations, FRA would need to meet the high burden of proof entailed in sustaining such an order if it is challenged.[9]

IV. Foreign Regulatory Jurisdiction

FRA may be unable to rely on foreign laws and rules governing dispatchers, in themselves, to ensure safety in accordance with FRA requirements. There can be a number of complexities in the ways foreign laws and regulations apply to dispatching. First, although dispatching can be performed from any country in the world, not every country in the world has an entity that regulates rail transportation safety. Second, even if the host country has established a transportation regulatory entity, that entity may well lack full safety jurisdiction over the railroad operations in the United States that are being dispatched from the host country.

With respect to a host country regulatory agency's level of regulatory authority over the individual dispatchers who conduct extraterritorial dispatching, there appear to be at least four different levels of jurisdiction over these dispatchers, depending on their relevant duties. For jurisdiction purposes, an extraterritorial dispatcher could likely fall into one of at least four categories:

Type 1—a dispatcher who controls both operations in the host country and operations in the United States during a single tour of duty for every tour of duty;

Type 2—a dispatcher who controls both operations in the host county and operations in the United States during a single tour of duty but not during every tour of duty;

Type 3—a dispatcher who sometimes controls operations in the host country and sometimes controls operations in the United States, but never operations

[7] FRA's SACP program on the post-merger UP continues today, and dispatching is still an important aspect of the program. As a result of the continued monitoring of UP's activities, UP hired 114 new dispatchers in 1998 and, as of mid-year 1999, planned to hire 124 new dispatchers by the end of 1999. In part as a result of this effort, problems with rail traffic congestion and accidents have been addressed.

[8] Safety advisories are also known as safety directives and safety bulletins. All three serve the same purpose—to advise the regulated community of critical safety information.

[9] In order to justify an emergency order, FRA must establish that ''an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death or personal injury.'' *See* 49 U.S.C. § 20104(a).

in both countries during a single tour of duty; and

Type 4—a dispatcher who controls only operations in the United States and never controls operations in the host country.

For example, if the host country's hours of service restrictions (if any) apply in the same manner as FRA has traditionally interpreted those of the United States (49 U.S.C. ch. 211), then those restrictions would normally apply only if the nexus to railroad safety in the host country is clear because the dispatcher controls railroad operations that occur in the host country at least at some point during his or her duty tour. Several conclusions result. First, the host country's rules would always apply to a Type 1 dispatcher (because he or she is controlling operations in the host country and thus performing service subject to those rules during each of his or her duty tours). Second, the host country's rules would apply only sometimes to a Type 2 or Type 3 dispatcher (only during the duty tours when he or she controls operations in the host country). Third, the host country's rules would never apply to a Type 4 dispatcher (because he or she does not control operations in the host country during his or her duty tour). Of course, the necessity for the Type 2 and Type 3 dispatcher to comply with the host country's rules during some of his or her duty tours might benefit the safety of United States railroad operations, but not as much as if the rules applied to all of his or her duty tours. In the case of the Type 4 dispatcher, who controls only operations in the United States and none in the host country, the probable inapplicability of the host country's safeguards against fatigue to any of his or her dispatching would mean that he or she could legally be required to work for dangerously long periods of time, which would increase the risk of human error that could lead to train accidents and train incidents in the United States. Similar typologies and scenarios could be created with respect to the dispatching centers themselves (e.g., security measures) and to other aspects of the dispatching function, such as training in the railroad company's operating rules paralleling part 217.

FRA invites comments on this potential regulatory gap and how it could be addressed if extraterritorial dispatching is allowed.

V. Hours of Service, Operating Rules Compliance, and Substance Abuse Concerns

Moreover, current regulations and statutes governing hours of service limitations, operational testing, and drug and alcohol programs applicable to dispatchers are not uniform throughout foreign countries, and may fall below the safety standards established by the United States' statutes and regulations. Therefore, even if a foreign country's regulations and statutes applied to and completely covered cross-border dispatching of United States rail operations, the safety of the United States rail operations may not be protected to the same degree as when dispatchers are subject to United States statutory and regulatory requirements or their equivalents. Any dispatcher, wherever located, who controls rail operations while under the influence of alcohol or drugs, exhausted because of working excessive hours, or not properly trained and tested on railroad operating rules could issue incorrect directions or could fail to issue directions, thereby jeopardizing the safety of railroad employees or causing a train collision or derailment with resulting injuries or death to train crews, passengers, or both, and possible harm to surrounding communities. Because problems such as fatigue, drug and alcohol abuse, and lack of effective job training seriously compromise the safety-critical performance of employees who dispatch trains, FRA is concerned that foreign railroads, or domestic railroads that may employ or enter into a contract for services of a foreign-based dispatcher who would control a domestic train movement, must comply with the substantive requirements of the United States hours of service laws, FRA hours of service recordkeeping regulations, FRA operational testing regulations, and FRA drug and alcohol testing regulations, or their equivalents.

At present, it does not appear that, for example, Canadian hours of service and drug testing requirements are the full equivalents of United States statutory and regulatory requirements. For example, under United States law, dispatchers may work no more than twelve hours in a location where only one shift is employed and no more than nine hours in a location where two or more shifts are employed, but Canada does not regulate hours of service for dispatchers. The lengths of their shifts are determined by labor agreements between the applicable union and the respective railroads.[10] In addition, FRA regulations require that United States dispatchers undergo operational testing, but Canada has no such requirement. United States alcohol and drug testing requirements are also more comprehensive and stringent than most other countries' standards.

In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143 (the Act), Congress recognized the importance of drug and alcohol testing in protecting the safety of domestic transportation systems. *See, supra*, note 4. As stated in the fifth Congressional finding in that Act, Congress believed that ''the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, especially random testing.'' *Id.* Given that the misuse of alcohol and drugs has proven to be a critical factor in transportation accidents, testing is integral to ensuring that domestic transportation systems, including railroads, operate in the safest possible manner. In response to Congress' directives in the Act, FRA expanded its existing regulations relating to drug and alcohol use in railroad operations.

Under FRA's mandatory alcohol and drug testing program, dispatchers working in the United States are subject to random, reasonable suspicion, return-to-duty, follow-up, and post-accident drug and alcohol testing as well as pre-employment testing for drugs. Post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA thresholds. *See* § 219.203. A dispatcher found to have violated FRA's drug and alcohol rules at §§ 219.101 or 219.102 is required to be removed from covered service and is required to complete a rehabilitation program. *See* § 219.104. A dispatcher who refuses to submit a required sample is required to be removed from covered service for nine months and to complete a rehabilitation program. *See* §§ 219.104, 219.107, and 219.213. Additionally, covered employers must provide self-referral and co-worker report (self-policing) programs for their employees. *See* subpart E.

All dispatchers working in the United States who are controlling United States railroad operations are covered by these regulations, and FRA believes that any extraterritorial dispatcher controlling railroad operations in the United States must be covered by the same or fully equivalent requirements.[11] To allow any

[10] It is arguable whether the hours of service laws of the United States (49 U.S.C. ch. 211) may be applied extraterritorially. In the past, FRA has not done so. If in the future FRA does apply the United States hours of service laws to activity outside of the United States, FRA's monitoring and enforcement actions would be subject to all of the problems discussed in Section IV and elsewhere in this preamble.

[11] As previously noted, dispatchers of a foreign railroad whose primary reporting point is located

dispatchers who are not subject to the comprehensive and stringent testing requirements that DOT and FRA believe are necessary for rail safety to control domestic operations would be contrary to FRA's safety efforts.

Drug and alcohol abuse by railroad workers is not limited to the United States.[12] While some countries, such as Canada, have addressed the serious threat that alcohol and drug use poses to the safety of railroad operations, they have done so in a less comprehensive manner than FRA's approach in implementing our statutory scheme. For example, Transport Canada has doubts whether Canadian Constitutional law permits it to implement our regulatory scheme. To date, Transport Canada has not imposed drug and alcohol rules like those of DOT, although motor carriers in Canada have implemented DOT drug and alcohol rules with respect to drivers who enter the United States. Transport Canada has approved Rule G, which was developed by the Canadian railroad industry, but has not reviewed and approved individual railroad plans implementing Rule G.[13] Rule G does not directly prohibit off-duty use of drugs and abuse of alcohol by dispatchers as contrasted with FRA's regulations, which prohibit any off-duty use of drugs and which prohibit use of alcohol within four hours of reporting for covered service or after receiving notice to report for covered service since such usage may ultimately affect an individual's performance on the job. *See* §§ 219.101(a)(3) and 219.102. Furthermore, unlike the FRA's part 219, Rule G also does not provide for alcohol and drug testing of railroad employees. In certain cases, railroads have developed their own testing plans.

FRA has reviewed the Canadian railroads' drug and alcohol testing plans implementing Rule G and found that they are not fully equivalent to FRA's rules. For example, CP's current plan does not provide for random testing, which is a key part of a program to deter drug and alcohol abuse; nor are CP's provisions with respect to pre-employment testing, reasonable suspicion testing, post-accident testing, and refusal to provide a sample equivalent to FRA's more stringent rules.[14] In fact, the only aspect of CP's plan that would be acceptable to FRA is the self-referral and co-worker report (self-policing) programs, and FRA believes that even those programs would need changes before they would be completely acceptable.

In addition, some drugs, such as codeine, which have adverse effects on judgment and reaction time and are available only with a prescription in the United States are available over-the-counter in foreign countries, and over-the-counter formulations may have stronger sedative effects than their United States equivalents.

VI. Security Issues

No nation is immune from criminal actions affecting workplaces or the potential for terrorism. In the United States, occasional workplace shootings by angry or unhinged employees and major incidents like the Oklahoma City and 1993 World Trade Center bombings have heightened awareness of the need for security measures, particularly at critical facilities or with respect to the movement of extremely hazardous materials (e.g., radioactive substances or military munitions). This nation

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outside of the United States and who perform service in the United States are currently exempt from certain Part 219 requirements. *See* 49 CFR 219.3(c). Elsewhere in the **Federal Register**, FRA is publishing an NPRM that proposes revisions to Part 219 requiring drug and alcohol testing of such employees.

[12] In 1987, a Canadian survey commissioned by a federally appointed Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry interviewed by telephone 1,000 randomly selected Canadian railway workers who held positions identified as ''safety-sensitive,'' including dispatchers. The information was collected to assist the Task Force in making recommendations to the Canadian government on steps needed to address any problems of substance abuse in the railroad industry.

The survey revealed, among other things, that 20.6 percent of those surveyed had come to work feeling the effects of alcohol and 9.2 percent felt that their use of alcohol had at some time compromised job safety. In addition, 3.8 percent admitted using illegal drugs, 2.5 percent admitted to using illegal drugs during their shift, and 4 percent were aware of other workers taking drugs during working shifts. As the following passage from a recent Canadian arbitration award involving CN illustrates, drug and alcohol abuse problems continue to exist in Canada:

''* * * As related in the submission of the employer's counsel, CN has extensive experience in drug and alcohol testing over the past decade, including circumstances of hiring, promotion, reasonable cause and post accident testing. Its data confirm a relatively high incidence of positive test results across Canada, exceeding ten per cent over all categories of testing in Western Canada. While positive drug tests obviously do not confirm that individuals in the railway industry have necessarily used illegal drugs while at work, a substantial number of awards of the Canadian Railway Office of Arbitration provide a well-documented record of cases which reveal the unfortunate willingness of some employees to have drugs or alcohol in their possession while at work, to use them while at work, or to report for work under their influence * * *.''

In the Matter of an Arbitration Between Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (Union) and Canadian Council of Railway Operating Unions (Intervener), Re: the Company's Drug and Alcohol Policy at 123–24, Arbitrator Michel G. Picher (July 18, 2000).

The drug and alcohol abuse problem in Canada is relevant to the current problem posed by extraterritorial dispatching and helps demonstrate the need for more comprehensive drug and alcohol testing of extraterritorial dispatchers controlling railroad operations in the United States.

[13] Rule G provides that:

(a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

(b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

(c) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty is prohibited.

(d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

[14] Problems with CP's plan are as follows. First, CP's plan does not provide for random testing, which Congress found, and FRA's experience has shown to be, so integral to preventing drug and alcohol abuse in the United States. Credible research indicates that a ''broad-based'' approach (with a credible random deterrence program), like FRA's is the only effective methodology to reduce the adverse effects of substance abuse.

Second, CP will not conduct post-accident testing unless there is independent evidence that causes the railroad to suspect impairment of the dispatcher. By contrast, a dispatcher in the United States who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA thresholds as determined by a train supervisor must be tested or else face a nine-month suspension from covered service and the requirement to complete a rehabilitation program and return-to-duty testing before returning to dispatcher service. CP will not use equivalent sanctions against an employee for failing to provide a sample; the problem with this approach is discussed below.

Third, while CP's plan does provide for reasonable suspicion testing, CP will not require an employee to provide a sample for testing. If CP's investigation fails to establish that the employee was impaired, the employee may go back to work without penalty or rehabilitation. Obviously, in many instances, establishing impairment would be difficult without a sample. In contrast, if a dispatcher in the United States refuses a test, he or she is Federally prohibited from performing service as a dispatcher for nine months and must complete required rehabilitation before being allowed to return to dispatching service. Even if FRA were able to apply the disqualification requirements of part 219 to a foreign-based dispatcher who refused a random, for cause, or post-accident test, and if the railroad were able to honor this sanction under foreign law, that sanction might be wholly ineffective because the railroad could legally reassign the dispatcher to a desk handling only host-country traffic, where he or she would suffer no loss of pay. The result would be a near-total loss of the deterrent effect associated with testing.

Fourth, FRA regulations require that new applicants and existing employees seeking to transfer for the first time from non-covered service to duties involving covered service (e.g., dispatching) must undergo pre-employment testing for drugs. CP would make such testing a condition of employment for new employees, but would not apply it to incumbent employees within the department under which dispatchers fall who apply for dispatching jobs. It is sometimes difficult to detect and document drug use in an employee population and, therefore, it is important to do the screening test for anyone who is moving into a safety-sensitive position.

experienced a much more extreme example of a security breach on September, 11, 2001, when terrorists slipped through security forces at three major U.S. airports and subsequently hijacked four airliners. Two of the planes were intentionally flown into the World Trade Center, resulting in the collapse of the Twin Towers, one was intentionally flown into the Pentagon, and the fourth crashed in rural Pennsylvania, presumably before reaching its intended target. As a result of these attacks, over 3,800 people were killed and the landscape of this country was changed forever as not only did the attacks cause an incredible amount of destruction but they also proved unequivocally that citizens of the United States are targets for terrorists and that those terrorists view modes of transportation, including railroads, as a means of carrying out their murderous agendas.[15]

Given the threat that terrorists pose to railroads systems, including their dispatch centers, railroad security measures such as guards that control access to railroad facilities, proximity cards that allow access to dispatching locations, use of railroad police to detect unauthorized persons on railroad property, and background checks on applicants for employment as dispatchers and train crew members are increasingly important to protect railroad property, railroad employees, and railroad passengers from violent actions. FRA is working with domestic railroads as they review the adequacy of their security plans and expects that the railroads will voluntarily take whatever steps are needed to safeguard their systems from terrorists. However, FRA has the authority to require, through regulations and orders, additional security measures that FRA determines are necessary to protect the security of domestic railroad operations against potential terrorist threats.[16]

Law enforcement and security agencies in the United States cannot protect extraterritorial dispatch facilities, and FRA has neither the access to such facilities to investigate instances of violence nor the authority to require additional security measures that FRA determines are necessary to protect the security of domestic railroad operations against potential terrorist threats. FRA does not know, at this time, whether foreign railroads employ security measures comparable to those of United States railroads or whether foreign governments have enforceable security requirements that would effectively protect dispatch facilities. As a result, foreign-based facilities could be more attractive targets than facilities located in the United States and be more susceptible to terrorist infiltration or attack.[17] FRA believes it could not approve a railroad's stationing of dispatchers in a foreign country absent a showing that the security protections afforded the dispatching function were equivalent to those at United States dispatch facilities, and FRA had access to investigate incidents of violence occurring at these facilities.

There is also a national defense aspect to the security of railroad operations. There are both railroad safety and national defense risks posed by extraterritorial dispatch centers having access to information regarding the shipment of military goods (e.g., nuclear weapons and armored vehicles) and extremely hazardous materials (e.g., radioactive materials), and having the capability to control the movement of these items. The Military Traffic Management Command of the Department of Defense (DOD) and FRA have worked together to identify and designate a Strategic Rail Corridor Network (STRACNET). STRACNET consists of more than 30,000 miles of interconnected network of rail corridors (not actual rail lines) in the United States that the agencies have deemed vital to national defense. In the event of a large-scale military mobilization, it is very important that this network be fully responsive to national defense needs and priorities. In any arrangement locating dispatchers abroad, FRA believes, there would have to be effective provisions to ensure that this national defense need can be met. FRA seeks comment on whether, and how, this goal could be accomplished.

VII. Language Differences

There are also safety concerns that are more likely to arise specifically because dispatchers are located in a foreign country. There would need to be a satisfactory resolution to such issues before FRA would be comfortable in permitting dispatchers to be located abroad. For example, it is essential for safe railroad operations that employees involved with directing and effectuating train movements be able to communicate clearly with each other. The railroad personnel most directly involved with train movements are the dispatchers who transmit written and oral instructions to train crews and the train crews who are responsible for carrying out the dispatchers' instructions and for operating trains in accordance with railroad traffic control devices. In addition, dispatchers must also be able to communicate with roadway workers who may control entry onto the stretches of track on which they are working. If it is allowed, extraterritorial dispatching raises the possibility that some of these employees may not be able to communicate with each other because they speak different languages.

FRA's primary safety concern is that one of the parties (either the train crew or the dispatcher) involved in an extraterritorially dispatched operation may not be proficient in the language that is being used to conduct train operations. Thus, there is the potential for miscommunication where one of the parties, unbeknownst to the other, fails to convey necessary safety-critical information, inadvertently conveys false or misleading information, or fails to properly understand safety-critical information that has been conveyed. The results of such a miscommunication could be disastrous. Such a lack of understanding would be even more problematic if railroad operations crossed more than one border (e.g., Canada, the United States, and Mexico).

Another problem related to communication that could arise if extraterritorial dispatching is allowed concerns possible differences in railroad terminology between one country and another. The railroad industry in the United States is both a highly technical industry that uses modern terms and an industry that has existed for 170 years and uses terms that have existed since at least the turn of the century. It would be unreasonable to assume that, absent

[15] According to the testimony of a convicted terrorist, terrorism training in Afghanistan included "'how to blow up the infrastructure of a country'—such as military installations, electric plants, corporations, airports and railroads," *Convicted Terrorist Testified on Deadly Training,* Wash. Times, September 27, 2001, at A14 (emphasis added).

[16] Section 20103(a) of title 49, United States Code, gives the Secretary of Transportation plenary authority to address any hazards to life and property that may arise in the context of railroad operations. To date, FRA's exercise of this authority has been limited. FRA has issued rules on Passenger Train Emergency Preparedness (49 CFR part 239) that require passenger railroads to conduct detailed planning for emergency situations, which are defined to include "security situations" such as bomb threats. (See 49 CFR § 239.7 and 49 U.S.C. § 20133(a)(4).)

[17] FRA's concern is not limited to Third World countries or countries where terrorists are traditionally expected to operate. A recent article in the Washington Post highlighted the threat that currently exists in Canada. According to the article, "Canada's intelligence agency has identified more than 50 terrorist groups and 350 individual terrorists who live, work and raise money in Canada." Deneen L. Brown, *Attacks Force Canadians to Face Their Own Threat,* The Washington Post, Sept. 23, 2001, at A36. The article went on to note that some of those terrorists were from countries in the Middle East, which is the region of the world from which the terrorists who masterminded the September 11, 2001, attacks are believed to have come.

appropriate training, railroad employees in other countries would be familiar with terms used in the United States. Given the immediacy with which problems sometimes develop while trains are on the tracks, it would be dangerous to discover such a miscommunication at a time when lives and property are in the balance. This problem would be compounded if the dispatcher and the train crew were having problems communicating because of language differences.

The Federal Aviation Administration also recognized that international operations cause communication problems. That agency, however, has addressed the problem through regulations requiring that all domestic air traffic controllers speak English and that all foreign air carriers who operate in the United States have personnel in domestic air traffic control towers who, in the event that no member of a foreign air crew can communicate with ground personnel, speak both English and their native language. *See* 14 CFR 65.33 and 129.21. In addition, FAA is currently considering a requirement that would mandate that flight attendants understand sufficient English to communicate, coordinate, and perform all safety-related duties. That requirement is part of a comprehensive flight attendant training Notice of Proposed Rulemaking that FAA anticipates publishing in the near future. *See* 65 FR 23153 (Apr. 24, 2000).

FRA recognizes that there may be solutions to these problems and therefore requests comments on how to resolve these issues so that domestic rail safety is not compromised. FRA believes solutions to these problems would have to be found before extraterritorial dispatching could be permitted.

VIII. Units of Measure

It is also essential for safe railroad operations in the United States that certain railroad communications concerning such operations that relate to measurements of such critical factors as location, distance, and speed, use a common standard. The two currently used standards are English units, used predominately in the United States, and the International System of Units (''SI''), which is more commonly known as the ''metric system'' and is used by most of the rest of the world, including Canada and Mexico. Because a kilometer (roughly 3,280.8 feet) is approximately six-tenths the length of a mile (5,280 feet), the potential for confusion is obvious, especially where a measurement of such matters as speed, location, or distance is concerned. If a dispatcher instructs a train and engine crew to travel a specified number of kilometers at a certain speed measured in kilometers per hour and the crew mistakenly thinks that the dispatcher is referring to either or both measurements in miles, the consequences could be at best problematic and, at worst, devastating.[18] FRA requests comments on how to resolve the measurement issue so domestic rail safety is not compromised.

IX. Other Concerns

Communications and computing systems at centralized dispatching are extremely complex. When the operations of a dispatching center are disrupted, the main remedy is changing to local dispatching. This typically results in a considerable disruption of service. For example, in recent years the CSX dispatch center in Jacksonville, Florida went off line twice, because of a lightning strike and a hurricane evacuation. This resulted in significant delays and cancellations of freight and passenger service throughout much of the East Coast. It is theoretically possible for a railroad to establish a backup dispatching center that would be used in the event of such a disruption, but it is unlikely railroads would consider doing so, cost-effective. FRA believes that the greater the number of miles of track controlled by a dispatching center and the higher the volume of traffic involved, the less likely it is that normal dispatching operations could be continued by alternative means, resulting in more pervasive or longer-lived service disruptions. FRA has some concern that this problem could be exacerbated if primary dispatching centers were located out of the country.

With regard to labor issues, dispatchers are typically unionized employees subject to the Railway Labor Act (45 U.S.C. 151–188) (''RLA''), which prohibits strikes over contract interpretation. Under the RLA, Congress has the power to legislate an end to a strike by United States railroad employees, and has done so in 13 rail labor contract disputes. Dispatch employees based in a foreign country, however, are not subject to the RLA and a labor dispute in that country could severely affect United States rail operations, and possibly jeopardize transportation safety.

The railroad industry carries nearly 40 percent of United States intercity freight traffic in terms of ton-miles (over 1 trillion ton-miles a year), including huge quantities of hazardous materials. By comparison, trucks carry about 28 percent of the ton-miles, and pipelines and inland water transport account for the remainder. In addition, railroads provide commuter rail service in and around many of the nation's large cities; provide the infrastructure Amtrak uses for its intercity passenger operations outside the Northeast Corridor; and provide freight service to military facilities across the country. Other modes would be able to replace only a small portion of the transportation services provided by the railroads in the short term in the event of a disruption of service affecting the national major freight railroads. A disruption affecting any one of the major railroads could, of course, have a critical impact over time through cascading impacts across the national rail system because of the extensive interchange of rail traffic among the railroads and the impact on other railroads of service disruptions on lines where they enjoy trackage or haulage rights.

X. Options

When deciding on how to address the issue of extraterritorial dispatching and all of the safety, including security concerns discussed above, FRA examined two possible options. The first option, which is reflected in the Interim Final Rule, is to bar extraterritorial dispatching with the three minor exceptions explained above. The second option is to permit extraterritorial dispatching so long as (1) the foreign-based dispatchers are subject to the same safety standards applicable to dispatchers located in the United States (and enforced by FRA or by the host country with supplementary FRA oversight), and (2) the additional safety concerns previously identified, such as security, language differences, possible labor strikes and other disruptions, are adequately addressed.

The FRA has chosen the first option as the basis for this Interim Final Rule. Banning new dispatching of United States rail traffic by dispatchers stationed outside the country except for limited fringe border operations is a simple, understandable, straightforward, ''bright line'' approach that will clearly preclude disruptions to service or safety problems resulting from the various issues discussed above and provide greater security for dispatching

[18] FRA recognizes that the Hazardous Materials Regulations require that most measurements regarding the transportation of hazardous materials be given in metric units. Under 49 CFR 171.10, in order to ensure compatibility with international transportation standards, most units of measurement in the hazardous materials regulations are expressed using the SI. This requirement should have no impact on extraterritorial dispatching, however, as SI is currently the standard for domestic railroad operations involving hazardous materials.

facilities. Implementing this approach is more certain, particularly in the short term, because it will not require the exercise of judgment, negotiations over the details of a variety of issues with railroads (and perhaps with foreign governments), or the creation of new rules or mechanisms to deal with these issues. We seek comment, however, on whether there are costs or disadvantages to this approach that FRA should consider in choosing and implementing this option, and on whether any modifications would be beneficial.

The second option could be implemented by, for example, a provision allowing a railroad to apply to FRA for a waiver of the prohibition of dispatching from abroad. The waiver mechanism might, for example, be a more detailed version of the Interim Final Rule's § 241.7. FRA would grant such a waiver only if it were satisfied (1) that the dispatchers involved in controlling United States rail traffic were subject to safety requirements (e.g., with respect to drug and alcohol testing, hours of service, and efficiency testing) fully equivalent to United States standards; (2) that FRA had full and open access to dispatch facilities located abroad, on the same basis as it has to United States facilities; (3) that, as a matter of law or binding agreement with FRA, the railroad would be subject to FRA enforcement actions with respect to the dispatching function, such as civil penalties, emergency and compliance orders, orders disqualifying employees from service for safety violations, court injunctions, etc., on an equivalent basis to railroads whose facilities were located in the United States; and (4) that measures were in place that adequately addressed security issues, labor disputes, language and other communication issues, and measurement issues. It would also be necessary to include a provision for the revocation of the waiver in the event the railroad could no longer meet its conditions, which would have the effect of reimposing the ban on dispatching United States rail traffic from abroad.

As can readily be seen, such an option is much more complex and uncertain than the first option, and it is not clear that any railroad could meet the conditions involved in such an option today. FRA seeks comment on whether it would be useful to include such a provision in the future, or whether it would be essentially futile to do so.

FRA believes that the problems with allowing widespread extraterritorial dispatching are substantial enough and are not sufficiently addressed at the present time to allow such dispatching. However, FRA recognizes that there may be reasonable solutions to these problems that may result in extraterritorial dispatching being performed as safely as domestic dispatching. Therefore, FRA is soliciting comments from interested parties on how to effectively address these concerns so that the safety of domestic rail operations is not compromised.

While FRA is soliciting comments, however, FRA believes that it is necessary to issue this Interim Final Rule in order to block the movement of dispatcher positions to foreign countries, other than for limited fringe border operations, while FRA is determining whether more extensive extraterritorial dispatching should be allowed. Given the safety-critical role that dispatchers play in railroad operations, the safety problems identified with extraterritorial dispatching, and the definite potential that some D&H dispatching functions could be moved to Canada in the very near future, extended notice-and-comment procedures are ''impracticable, unnecessary, or contrary to the public interest'' within the meaning of section 4(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). The safety concerns, including security, that this rule is designed to eliminate could very well materialize in the near future before a typical notice-and-comment rulemaking process could be completed. As a consequence, FRA is proceeding directly to an Interim Final Rule.

However, in accordance with Executive Order 12866, FRA is allowing 60 days for comments. FRA believes that a 60-day comment period is appropriate to allow the public to comment on this Interim Final Rule. The Interim Final Rule will terminate on December 11, 2002 unless FRA takes future action to extend the sunset date. FRA solicits written comments on all aspects of this Interim Final Rule, and possible alternatives to the locational requirement of part 241. Parties favoring alternative approaches should provide detailed rationale for their recommended approach together with specific regulatory language they would like FRA to issue. FRA is also soliciting comments on whether the exception for the track segments that were extraterritorially dispatched as of December 1999 should be permanent or for a set period of time. Finally, FRA is soliciting comments on whether dispatching of fringe border operations permitted under the Interim Final Rule should be made permanent.

Based on the comments, FRA may: (1) Issue final rule amendments to the Interim Final Rule making the Interim Final Rule permanent with any substantive changes FRA determines are appropriate; (2) issue a notice proposing a new rule (a notice of proposed rulemaking), and possibly a final rule amendment extending the deadline of the Interim Final Rule while FRA completes this new rulemaking; or (3) decide that no Federal regulation is appropriate and issue a final rule removing the Interim Final Rule.

FRA also directs commenters' attention to certain issues related to the possible application of part 219 to extraterritorial dispatchers. As noted earlier, these issues are addressed in detail in an FRA notice published in the **Federal Register** today proposing amendments to part 219 concerning employees of a foreign railroad who are based outside the United States and engage in train or dispatching service in the United States.

XI. The Interim Final Rule

FRA is issuing this Interim Final Rule prohibiting extraterritorial dispatching of United States rail operations, with three minor exceptions. Under the first exception, a railroad would be allowed to conduct extraterritorial dispatching in an emergency situation for the duration of the emergency if it promptly notified the appropriate FRA Regional Administrator(s) in writing of its actions. Under the second exception, FRA would permit the continued extraterritorial dispatching of the very limited track segments in the United States that were regularly being so dispatched in December 1999. Under the third exception, railroads would be permitted to dispatch ''fringe border operations,'' as defined in the rule, from either Canada or Mexico. In addition, railroads that propose to conduct additional extraterritorial dispatching of railroad operations in the United States may apply for a waiver from the prohibitions of part 241 under subpart C of part 211.

XII. Section–By–Section Analysis

This section-by-section analysis is intended to explain the provisions of the Interim Final Rule. A number of these provisions and issues related to these provisions have been addressed earlier in this preamble. Accordingly, the preceding discussions should be considered in conjunction with those below and will be referred to as appropriate.

Section 241.1 Purpose and scope. Paragraph (a) states that the purpose of the rule is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching

of railroad operations in the United States by persons located outside of the United States. As noted earlier in the preamble, dispatchers are responsible for establishing a train's route and ensuring that the train has a clear track in front of it. As such, it is essential that dispatching be conducted as safely as possible in order to avoid incidents such as collisions and derailments that endanger train crews, other railroad employees, and the general public.

Paragraph (b) states that the rule prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. Because FRA believes that extraterritorial dispatching presents serious safety problems and because proper dispatching is such an integral part of safe railroad operations, FRA believes that widespread extraterritorial dispatching of United States rail operations should be prohibited. FRA also wants to address every possible situation by prohibiting any kind of contracting relationship that would entail extraterritorial dispatching. These prohibitions will be more fully explained elsewhere in this section-by-section analysis. Of course, railroads subject to this part may adopt and enforce additional or more stringent requirements provided they are not inconsistent with this part.

Section 241.3 Application and responsibility for compliance. This section employs what is essentially standardized regulatory language that FRA plans to use in most of its rules. Paragraphs (a) and (b) mean that railroads whose entire operations are conducted on track within an installation that is outside of the general railroad system of transportation in the United States (in this paragraph, ''general system'') are not covered by this part. Tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system would, therefore, not be subject to this part. The word ''installation'' is intended to convey the meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for the purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Paragraph (c) clarifies FRA's position that the requirements contained in this final rule are applicable not only to any ''railroad'' subject to this part but also to any ''person,'' as defined in § 241.5, that performs any function required by this final rule. Although various sections of the final rule address the duties of a railroad, FRA intends that any person who performs any action on behalf of a railroad or any person who performs any action covered by the final rule is required to perform that action in the same manner as required of a railroad or be subject to FRA enforcement action. For example, contractors that perform duties covered by these regulations would be required to perform those duties in the same manner as required of a railroad.

Section 241.5 Definitions. This section contains a set of definitions intended to clarify the meaning of important terms as they are used in the text of the rule. Several of the definitions involve fundamental concepts that require further discussion.

Dispatch. The first sentence of this definition is an abstract statement of its scope. FRA intends for the verb ''dispatch'' to encompass all of the functions of a ''dispatching service employee'' as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), were these functions to be performed in the United States. Under 49 U.S.C. 21101(2), a ''dispatching service employee'' is defined as ''an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.'' This statutory provision has been interpreted by FRA in a statement of agency policy and interpretation codified at part 209, appendix A. Consistent with that interpretation, both the statutory definition and part 241's definition of ''dispatch'' are functional, meaning that an individual's job title is irrelevant in determining whether he or she is dispatching. In addition, whether the individual is employed by a railroad is irrelevant. However, unlike the statutory definition of ''dispatch,'' the regulatory definition makes clear that the location of the individual performing the dispatching is irrelevant to the determination of the function the individual is performing. Thus, an individual located in a foreign country who, because of his or her job duties, would be covered by the statutory definition if he or she were located in the United States would be dispatching within the meaning of § 241.5. In addition, although FRA specifically mentions yardmasters under the definition of ''dispatcher,'' FRA does not intend for this rule to cover yardmasters as a job category. Instead, yardmasters are only covered by this part when they are performing dispatching functions.

The remainder of the regulatory definition repeats or attempts to make more explicit the meaning of the statutory language. One aspect of the act of dispatching is to use hand delivery or ''an electrical or mechanical device'' to control certain movements or to issue a certain authority. The quoted phrase has been interpreted by FRA in its hours of service record keeping regulations at 49 CFR 228.5(c) as including a ''telegraph, telephone, radio, or any other electrical or mechanical device.''

Subsection (i) of the definition of ''dispatch'' clarifies the types of movements that one who dispatches controls. One such movement that FRA intends to include is the ''movement of a train,'' which is defined in another paragraph of this section as a movement of on-track equipment requiring a power brake test under parts 232 or 238. Another type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations; again, however, FRA intends to exclude movements of on-track equipment used in the process of sorting and grouping rail cars inside a railroad yard in order to assemble or disassemble a train.

The definition of ''dispatch'' also makes explicit that the control of the movements within the scope of the definition is accomplished in one of two ways. The first way is by the issuance of a written or verbal authority or permission that affects a railroad operation such as through movement authorities and speed restrictions and includes the following:

Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a [dispatcher]. OP–97–34, p. 7.

''Railroad operation'' is defined in another paragraph of this section as the movement of a train or other on-track equipment (except as specified earlier) or ''the activity that is the subject of an authority issued to a roadway worker for working limits.''

The second way that control of the movements within the scope of the definition of ''dispatch'' is achieved is ''by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch.'' The act of aligning or realigning a switch alone is not sufficient to constitute dispatching. In order to constitute dispatching within § 241.5, aligning or realigning a switch must be accompanied by the act of setting a signal authorizing movement over a track segment. This exclusion is consistent with FRA's interpretation in Operating Practices Technical Bulletin (OP–96–04) and Operating Practices Safety Advisory (OPSA–96–03), reissued as OP–97–34 (hereinafter, ''OP–97–34'').

Subsection (ii) of the definition of ''dispatch'' clarifies that those railroad employees who issue an authority for either a roadway worker or stationary on-track equipment, or both, to occupy a certain stretch of track while performing repairs, inspections, etc., will also be covered by this rule. FRA included this section to distinguish this activity from that of authorizing movement of trains or other on-track equipment onto track.

Subsection (iii) of the definition of ''dispatch'' states another function of a dispatcher, which is to issue an authority for working limits to a roadway worker. As defined in another paragraph of this section,

[w]orking limits means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through ''exclusive track occupancy,'' ''inaccessible track,'' ''foul time'' or ''train coordination'' as defined in part 214 of this chapter.

Finally, the definition of ''dispatch'' makes explicit that the term excludes the activity of individuals carrying out a written or verbal authority or permission or an authority for working limits or operating a function of a signal system intended to be used by those individuals, such as initiating an interlocking timing device.

Dispatcher. The definition of ''dispatcher'' makes clear that the term is intended to refer to an individual who performs the function of dispatching, regardless of the individual's job title.

Emergency. An ''emergency'' under this part must be unexpected and unforeseeable and must interfere with a railroad's ability to dispatch a United States railroad operation domestically to the extent that if the operation is not dispatched extraterritorially there would be a substantial disruption in rail traffic or a significant safety risk. Planned shortages of domestic dispatchers relating to vacation scheduling or the railroad's failure to maintain an adequate list of extraboard employees and foreseeable train delays due to substandard maintenance and repair of rail equipment are not emergencies.

Typical examples of emergencies are the following: the sudden illness of a domestic dispatcher about to begin working the next duty shift when there is no other domestic employee nearby who could be called to substitute; the delay of a train operating on mainline track in reaching its station when the delay is due to the derailment of another train and the domestic dispatching office was scheduled to close until the next day after the domestic dispatcher completed his or her tour of duty; and unforeseeable system failures resulting in significant train delays when the available pool of domestic relief dispatchers is insufficient to safely handle the increased traffic density. In addition, other situations may constitute part 241 emergencies, depending on all the facts involved. The determination of whether a situation is an emergency must always be made on a case-by-case basis.

Finally, if extraterritorial dispatching service needed to abate an emergency is concluded before the end of a duty tour, the emergency provision does *not* provide license to continue the extraterritorial dispatching if an emergency no longer exists.

Extraterritorial dispatcher. The definition of ''extraterritorial dispatcher'' explains that the term refers to an individual who, while performing the function of a dispatcher from a country other than the United States, dispatches a railroad operation that takes place in the United States.

Movement of a train. This term is intended to have the same meaning as does the term ''train'' in 49 CFR 220.5.

Occupancy of a track by a roadway worker or stationary on-track equipment or both. This term refers to the physical presence of a roadway worker or stationary on-track equipment on a track for the purpose of making a repair, an inspection, or another activity not associated with the movement of a train or other on-track equipment. It is intended to cover situations where a stretch of track is being occupied for a certain period of time by roadway workers, with or without on-track equipment, for purposes not related to the movement of a train.

Roadway worker. This term is intended to have the meaning it has in 49 CFR §§ 214.7 and 220.5.

Section 241.7 Waivers. This section sets forth the procedures for seeking waivers of compliance with the prohibitions and requirements of this rule. Requests for such waivers may be filed by any interested party. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general prohibitions and requirements can be made without compromising or diminishing rail safety. This section is consistent with the general waiver provisions contained in other Federal regulations issued by FRA. FRA recognizes that circumstances may arise when conduct of extraterritorial dispatching that does not fall within one of the exceptions to the prohibition contained in this rule is appropriate and in the public interest.

Section 241.9 Prohibition against extraterritorial dispatching; exceptions.

Section 241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

Section 241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

These sections contain a series of three prohibitions, each containing three exceptions and a provision on liability for violation of the prohibition. To promote compliance, each provision imposes a strict liability standard. Actual or constructive knowledge of the facts constituting the violation is not required to establish a violation. For example, it is not necessary for a railroad conducting a railroad operation to know that the operation is being extraterritorially dispatched in order for the railroad to violate § 241.11.

Section 241.9(a) establishes a general rule barring a railroad from requiring or permitting one of its employees or one of its contractors' employees to dispatch a railroad operation that occurs in the United States while the railroad's employee (or railroad contractor's employee) is located outside the United States. A separate violation occurs for each railroad operation so dispatched; each day the violation continues is a separate offense. ''Railroad operation'' is defined in § 241.5. A dispatcher working in a foreign country and controlling only railroad operations in that country would not violate § 241.9(a). Likewise, a dispatcher located in the United States and controlling train operations in another country would not violate § 241.9(a), although nothing in this rule authorizes

such a practice where it contravenes the domestic law or policy of the country where the railroad operations are conducted.

Section 241.11(a) creates a general prohibition against performing a railroad operation on track in the United States if the railroad operation is dispatched by an individual located outside the United States. A separate violation occurs for each railroad operation performed that was so dispatched; each day the violation continues is a separate offense.

Section 241.13(a) generally forbids a track owner from requiring or permitting a segment of track that it owns to be used for a railroad operation in the United States that is controlled by a dispatcher in another country. A separate violation occurs for each railroad operation so dispatched that was permitted to occur on the owner's track; each day the violation continues is a separate offense.

There are three basic exceptions to each of these three general prohibitions. First, under paragraph (b) of §§ 241.9–241.13, extraterritorial dispatching of railroad operations that occur in the United States is permitted in the event of an emergency. The term ''emergency'' is defined in § 241.5, which has been discussed earlier. The railroad must notify the FRA Regional Administrator for the region in which the railroad operation occurs, in writing as soon as feasible, either on paper or by electronic mail, that the railroad is conducting such extraterritorial dispatching. If the operation occurs in more than one region, the FRA Regional Administrator for each of the regions in which the operation occurs must be notified. Notification need not necessarily be in advance of the performance of the extraterritorial dispatching. The exception is allowed only for the period of time that the emergency exists. If a railroad continues extraterritorial dispatching after the emergency is over, the railroad is in violation of § 241.9(a).

Second, under paragraph (c) of §§ 241.9–241.13, extraterritorial dispatching of railroad operations that occur in the United States is allowed on the very limited segments of track that were regularly being so dispatched in December 1999, if the extraterritorial dispatching of those track segments is conducted from the same foreign country or territory or possession of the United States where the extraterritorial dispatching was done in December 1999. Paragraph (c) does not impose a limit on the volume of railroad operations over such track segments that may be dispatched extraterritorially.

Third, under paragraph (d) of §§ 241.9–241.13, dispatching from Canada or Mexico of a rail line located in the United States is permissible provided the length of the United States trackage being extraterritorially dispatched is no more than 100 miles, any train being so dispatched is under the control of the same assigned crew for the entire trip over U.S. trackage, and the train movement either both originates and terminates in the foreign country without the pick up, set out, or interchange of cars in the U.S. or is under the exclusive control of a single dispatching district, or ''desk'', and the portion of the line being extraterritorially dispatched extends no farther into the U.S. than the first of any of the following locations: an interchange point; signal control point; junction of two rail lines; established crew change point; yard or yard limits location, inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other government inspection; or location where there is a change in the method of train operations. In addition, FRA recognizes an exception to the single train crew requirement if an unforeseen circumstance, such as an equipment failure, accident, or casualty or incapacitation of a crew member necessitates another crew assuming control of the train while it is operating on U.S. track.

Essentially, paragraph (d) recognizes that it will not always be practical or economical to conduct a ''hand-off'' of train operations between a U.S. and a foreign dispatcher that normally would be required under Part 241, especially when the length of U.S. trackage involved is small and the train movements on that trackage make no stops in the U.S. FRA believes that the safety and security risks posed by these ''fringe border operations'' are minimal and, therefore, in order to promote the smooth flow of commerce across international borders, they should be permitted, but only to the extent necessary.

Paragraph (e) of §§ 241.9–241.13 discusses liability for violations of those sections. As provided in § 241.9(e), liability for extraterritorial dispatching of a railroad operation in the United States in violation of § 241.9 is on the entity that employs the individual who performed the extraterritorial dispatching, typically a railroad or a contractor to a railroad (if any), and if the employing entity is a contractor to a railroad, liability is also on the railroad. For example, if an employee of a railroad contractor performs the extraterritorial dispatching, FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual employee and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

As stated in § 241.11(e), liability for conducting a railroad operation that is extraterritorially dispatched in violation of § 241.11 is on the entity that conducts the operation, typically a railroad or a contractor to a railroad. For example, if employees of a railroad contractor engage in the movement of a train that is extraterritorially dispatched and not within the exceptions of paragraphs (b), (c), or (d), then FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual train crewmembers and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

Finally, as provided in § 241.13(e), liability for requiring or permitting the conduct of a railroad operation that is so dispatched over a segment of track is on the owner of the track segment. For purposes of § 241.13, the track owner includes the owner of the track segment, a person assigned responsibility for the track segment under § 213.5(c), and a railroad operating the track segment pursuant to a directed service order issued by the STB under 49 U.S.C. 11123, during the time that the directed service order is in effect. FRA may hold the track owner, the assignee, or the railroad operating the track under a directed service order, or some or all of such entities liable for a violation of § 241.13 (in addition to the individuals and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)). For example, if the track owner (Company A) has assigned responsibility for the track under § 213.5(c) to Company B and the track is used by a train that is dispatched by a dispatcher located outside of the United States, not within the exceptions of paragraphs (b), (c), or (d), then FRA may assess a civil penalty for violation of § 241.13 against either Company B or Company A, or both.

In a given instance in which an individual outside the United States dispatches a railroad operation that takes place in the United States (not within the exceptions of paragraphs (b), (c), or (d)), three regulatory prohibitions have been violated: §§ 241.9, 241.11, and 241.13. If one single entity dispatches and conducts the railroad operation and owns the track on which the railroad operation occurs, that entity may be assessed a separate civil penalty for each of the three sections violated.

On the other hand, if the three functions are performed by a total of three different entities, the entity that performed the function would be assessed a penalty only for the section it violated. As a matter of discretion, FRA may also cite the dispatching railroad for causing the violation of § 241.11(a) by the operating railroad or § 241.13(a) by the track owner in cases where the dispatching railroad fails to notify the FRA Regional Administrator of each region where the track is located of an emergency, and in other cases.

Section 241.15 Geographical boundaries of FRA's regions and addresses of FRA's regional headquarters.

Under §§ 241.9(b), 241.11(b), and 241.13(b), FRA requires a railroad that, because of an emergency situation, must extraterritorially dispatch a domestic railroad operation to inform the Regional Administrator of the FRA region(s) where the track over which the operation was conducted is located. The written notification must summarize the circumstances of the emergency and the extraterritorial dispatching and must be made either on paper or by electronic mail. In order to facilitate the notification process, Appendix B lists FRA's eight regions and the States that are included in those regions as well as the addresses of the eight regional headquarters where the notification(s) must be sent. If the emergency situation requires extraterritorial dispatching of a railroad operation that takes place in more than one of FRA's regions, the railroad conducting the emergency dispatching must provide this written notification of the emergency to the Regional Administrator for each of the affected regions.

Section 241.17 Penalties and other consequences for noncompliance.

This section identifies three of the sanctions that may be imposed upon a person for violating a requirement of part 241: civil penalties, disqualification, and criminal penalties.

Paragraph (a) on civil penalties parallels the civil penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least $500 and not more than $11,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $22,000 per violation may be assessed. *See* part 209, appendix A. In addition, each day a violation continues will constitute a separate offense. Civil penalties for violation of part 241 are authorized by 49 U.S.C. 21301, 21302, and 21304 and by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–358, 378, Apr. 26, 1996), which requires agencies to adjust for inflation the maximum civil monetary penalties within the agencies' jurisdiction. Consequently, the resulting $11,000 and $22,000 maximum penalties were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws. In addition to the civil penalty provision at § 241.17(a), this final rule includes a schedule of civil penalties for specific violations of part 241 as appendix A to this part.

Paragraph (b) provides that an individual who fails to comply with a provision of this part or causes the violation of a provision of this part may be prohibited from performing safety-sensitive service in accordance with FRA's enforcement procedures found in subpart D, part 209.

Paragraph (c) of § 241.17 provides that a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying a report required by these regulations, here, a report to the appropriate FRA Regional Administrator(s) concerning extraterritorial dispatching performed under a claim that it was performed to deal with an emergency. Section 21311(a) of title 49, United States Code, reads as follows:

(a) Records and Reports Under Chapter 201.—A person shall be fined under title 18, imprisoned for not more than 2 years, or both, if the person knowingly and willfully—

(1) makes a false entry in a record or report required to be made or preserved under chapter 201 of this title;

(2) destroys, mutilates, changes, or by another means falsifies such a record or report;

(3) does not enter required specified facts and transactions in such a record or report;

(4) makes or preserves such a record or report in violation of a regulation prescribed or order issued under chapter 201 of this title; or

(5) files a false record or report with the Secretary of Transportation.

FRA believes that the inclusion of these provisions for failure to comply with the regulations is important in ensuring that compliance is achieved.

Section 241.19 Preemptive effect. Section 241.17 informs the public of FRA's views regarding what will be the preemptive effect of the Interim Final Rule. While the presence or absence of such a section does not in itself affect the preemptive effect of an interim final rule, it informs the public about the statutory provision that governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard which provision is not incompatible with a Federal law, regulation, or order and does not unreasonably burden interstate commerce. With the exception of a provision that is not incompatible with Federal law, not an unreasonable burden on interstate commerce, and directed at an essentially local safety hazard, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations in this final rule.

Section 241.21 Information collection. This provision shows which sections of this part have been approved by the Office of Management and Budget (OMB) for compliance with the Paperwork Reduction Act of 1995. *See* 44 U.S.C. 3501 *et seq.* A more detailed discussion of the information collection requirements in this part is provided below.

Section 241.23 Termination of this part.

This provision provides that the Interim Final Rule will terminate 365 days after its effective date unless this date is extended by FRA. Based on the comments, FRA may: (1) Issue final rule amendments to the Interim Final Rule making the Interim Final Rule permanent with any substantive changes FRA determines are appropriate; (2) issue a notice proposing a new rule (a notice or proposed rulemaking), and possibly final rule amendments to the Interim Final Rule extending the deadline of the Interim Final Rule while FRA completes this new rulemaking; or (3) decide that no Federal regulation is appropriate, allow the Interim Final Rule to terminate, and perhaps issue a final rule removing the Interim Final Rule.

Appendix A—Schedule of Civil Penalties

This appendix contains a schedule of civil penalties to be used in connection

with this part. Because the penalty schedule is a statement of agency policy, notice and comment are not required prior to its issuance. *See* 5 U.S.C. 553(b)(3)(A). Commenters are invited to submit suggestions to FRA describing the types of actions or omissions under each regulatory section that should subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

Appendix B—Geographic Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

This appendix contains a list of FRA's eight regions and the States that are included in those regions as well as the addresses of the eight regional headquarters where notification of emergency extraterritorial dispatching of domestic operations must be sent.

XIII. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the Docket Management System at *http://dms.dot.gov.* FRA invites comments on this regulatory evaluation.

Public and private initiatives have successfully improved the safety of rail operations by reducing the number and severity of incidents, accidents, and resulting casualties. However, dilution of these standards and initiatives to accommodate increasing transborder rail traffic creates the potential for an increase in injuries and fatalities resulting from rail accidents. FRA expects that the locational requirement for dispatching of United States rail operations contained in the Interim Final Rule, or any future program permitting dispatching from abroad under equivalent standards, will prevent the dilution of the standards and initiatives that have led to safety levels currently experienced in the United States.

FRA expects that overall the rule will not impose a significant cost on the rail industry over the next twenty years. FRA believes it is reasonable to expect that several injuries and fatalities will be avoided as a result of implementing this Interim Final Rule. FRA also believes that the safety of rail operations will be compromised if this rule is not implemented.

The following table presents estimated twenty-year *monetary* impacts associated with the new locational requirement for dispatching of United States rail operations.

Description	Estimated 20-year costs (NPV)
Labor rate differential (foregone savings)—	$7,386,569
Additional dispatcher supervisors (cost of rule)—	220,398
Emergency situation notification (cost of rule)— ...	3,811
Dismissed employee compensation (avoided cost)—	(9,433,880)
Total Net Cost (NPV rounded)	(1,823,102)

The basis for these dollar figures is found in section 7.0 of the regulatory evaluation on file at FRA in the docket for this rulemaking. Certain costs resulting from the inability to achieve economies of scale are not quantified in this analysis. The savings from avoiding severance payments are finite and are incurred in the early years; the costs in terms of cost reductions not achieved are experienced in every year and potentially infinitely. The longer the term of the analysis, the higher the level of costs would be relative to benefits. For the twenty-year term of this analysis, net costs are expected to be negative. However, FRA believes that the safety benefits of the rule justify the long-term costs (the costs incurred after the first twenty years of this analysis).

As previously noted in this preamble, FRA has pointed out that the problems associated with permitting extraterritorial dispatching of United States rail operations include the following: hours of service, operating rules compliance, substance abuse, differences in language and units of measurement, security issues, and other concerns. Because FRA has no assurance that these problems can be satisfactorily addressed, FRA believes that the locational requirement imposed by the Interim Final Rule is the best way to ensure railroad safety.

Railroad accidents caused by error in human judgment or other human factors account for approximately a third of all reportable train accidents each year. Whereas errors on the part of train operators are typically limited in scope to the train the operator controls, errors by dispatchers, who usually control vast territories and the movements of many trains, can be truly disastrous.[19] In the absence of the protections afforded by current Federal statutory and regulatory requirements covering domestic dispatchers, FRA believes that additional dispatcher error-related accidents would occur were trains to be controlled by extraterritorial dispatchers. Given that the total costs of this Interim Final Rule are expected to be very low, the avoidance of only a few minor accidents or one major accident would justify this rule. A more detailed explanation of the benefits of this rule as well as a summary of the cost-benefit analysis can be found in Sections 8 and 9 of the regulatory evaluation on file at FRA in the docket for this rulemaking.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket a Regulatory Flexibility Assessment (RFA), which assesses the small entity impact. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the Docket Management System at *http://dms.dot.gov.*

Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (RFA), FRA has published an interim policy that formally establishes ''small entities'' as being railroads that meet the line-haulage revenue requirements of a

[19] For example, on June 22, 1997, two freight trains collided head-on in Devine, Texas. The trains were operating on single main track with passing sidings in nonsignalized territory in which train movement was governed by conditional track warrant control authority through a dispatcher. A conductor, an engineer, and two unidentified individuals were killed in the derailment and subsequent fire. The National Transportation Safety Board determined that the probable cause of the accident was the failure of the third-shift dispatcher to communicate the correct track warrant information to one of the train crews and to verify the accuracy of the read-back information.

Class III railroad. 62 FR 43024 (Aug. 11, 1997). For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

The RFA concludes that this final rule would not have a significant economic impact on a substantial number of small entities. FRA further certifies that this Interim Final Rule is not expected to have a significant economic impact on a substantial number of small entities.

About 645 of the approximately 700 railroads in the United States are considered small businesses by FRA. The Interim Final Rule applies to all railroads except (1) railroads that operate only on track that is within an installation that is not part of the general railroad system of transportation and (2) urban rapid transit operations that are not connected to the general railroad system. Approximately 25 tourist and museum railroads that are small businesses do not operate on the general railroad system. Therefore, this rule will affect approximately 620 small entities. Small railroads that will be affected by the final rule provide less than 10 percent of the industry's employment, own about 10 percent of the track, and operate less than 10 percent of the ton-miles.

The American Shortline and Regional Railroad Association (ASLRRA) represents the interests of most small freight railroads and some excursion railroads operating in the United States. According to the ASLRRA, none of its members has shown any interest in relocating their dispatching to foreign countries or in contracting out their dispatching functions to entities in foreign countries. Because tourist, scenic, historic, excursion, and other small railroads generally do not own the right-of-way on which they operate and rely on the host railroad to dispatch their trains, these small railroads would not be affected by the United States locational requirement for dispatching of United States rail operations. Nevertheless, small rail operators have an opportunity to comment on this Interim Final Rule.

FRA field offices and the ASLRRA engage in various outreach activities with small railroads. For instance, when new regulations are issued that affect small railroads, FRA briefs the ASLRRA, which in turn disseminates the information to its members and provides training as appropriate. When a new railroad is formed, FRA safety representatives visit the operation and provide information regarding applicable safety regulations. The FRA regularly addresses questions and concerns regarding regulations raised by railroads. Because this rule is not anticipated to affect small railroads, FRA is not providing alternative treatment for small railroads under this rule.

C. Paperwork Reduction Act

The information collection requirements in this Interim Final Rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

49 CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
241.7—Waivers	5 railroads	1 waiver petition	4 hours	4 hours	$152.
241.9—Prohibition against extraterritorial dispatching; exceptions.	5 railroads	1 notification	8 hours	8 hours	$360.
241.11—Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.	5 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.
241.13—Prohibitions against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.	5 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), the FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202–493–6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 17, Washington, DC 20590.

OMB is required to make a decision concerning the collection of information requirements contained in this interim final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this Interim Final Rule.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of a final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**, and text will be added to § 241.21, Information collection.

D. Federalism Implications

Executive Order 13132, entitled, ''Federalism,'' issued on August 4, 1999, requires that each agency ''in a separately identified portion of the

preamble to the regulation as it is to be issued in the **Federal Register**, provide[] to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met * * *.''

When issuing the Interim Final Rule in this proceeding, FRA has adhered to Executive Order 13132. Normally, FRA engages in the required Federalism consultation during the early stages of the rulemaking through meetings of the full Railroad Safety Advisory Committee (''RSAC''), on which several representatives of groups representing State and local officials sit. However, FRA determined that, because the possibility exists that at least one railroad may engage in extensive extraterritorial dispatching in the very near future, these issues have been addressed without the benefit of a presentation to the full RSAC. In order to comply with Executive Order 13132, FRA sent a letter soliciting comment on the Federalism implications of this Interim Final Rule and the NPRM involving part 219 that FRA is currently working on nine groups designated as representatives for various State and local officials. The nine organizations were as follows: the American Association of State Highway and Transportation Officials (AASHTO), the Association of State Rail Safety Managers, the Council of State Governments, The National Association of Counties, the National Association of Towns and Townships, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors. In addition, FRA representatives had informal discussions with representatives of some of those groups. During one such consultation, a representative of AASHTO expressed confidence that FRA and State interests would closely coincide on these issues. He noted that the September 2000 meeting of AASHTO's Standing Committee on Rail Transportation would include a significant discussion of the pending STB proceeding (involving the proposed consolidation of CN and BNSF), with the implication that FRA's rulemakings may be a current topic at that time. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives.

E. Environmental Impact

FRA has evaluated this regulation in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions Categorically Excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The Interim Final Rule would not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

List of Subjects in 49 CFR Part 241

Communications, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons set forth in the preamble, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, by adding Part 241 to read as follows:

PART 241—UNITED STATES LOCATIONAL REQUIREMENT FOR DISPATCHING OF UNITED STATES RAIL OPERATIONS

Sec.
241.1 Purpose and scope.
241.3 Application and responsibility for compliance.
241.5 Definitions.
241.7 Waivers.

241.9 Prohibition against extraterritorial dispatching; exceptions.
241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
241.15 Geographical boundaries of FRA's regions and addresses of FRA's regional headquarters.
241.17 Penalties and other consequences for noncompliance.
241.19 Preemptive effect.
241.21 Information collection.
241.23 Termination of this part.
Appendix A to Part 241—Schedule of Civil Penalties
Appendix B to Part 241—Geographical Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

Authority: 49 U.S.C. 20103, 20107, 21301, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49.

§ 241.1 Purpose and scope.

(a) The purpose of this part is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching of railroad operations in the United States by individuals located outside of the United States.

(b) This part prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§ 241.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Although the duties imposed by this part are generally stated in terms of a duty of a railroad, each person, including a contractor for a railroad, who performs a function covered by this part, shall perform that function in accordance with this part.

§ 241.5 Definitions.

As used in this part:

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Dispatch means:

(1) To perform a function that would be classified as a duty of a ''dispatching service employee,'' as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. In particular, *dispatch* means to use a telegraph, telephone, radio, or any other electrical or mechanical device, or hand delivery—

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation or by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) To issue an authority for working limits to a roadway worker.

(2) The term *dispatch* does not include the action of personnel in the field effecting implementation of a written or verbal authority or permission affecting a railroad operation or an authority for working limits to a roadway worker, or operating a function of a signal system designed for use by those personnel (e.g., initiating an interlocking timing device).

Dispatcher means a train dispatcher, control operator, yardmaster, or other individual who dispatches.

Emergency means an unexpected and unforeseeable event or situation that affects a railroad's ability to use a dispatcher in the United States to dispatch a railroad operation in the United States and that, absent the railroad's use of an extraterritorial dispatcher to dispatch the railroad operation, would either materially disrupt rail service or pose a substantial safety hazard.

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this part.

Extraterritorial dispatcher means a dispatcher who, while located outside of the United States, dispatches a railroad operation that occurs in the United States.

Extraterritorial dispatching means the act of dispatching, while located outside of the United States, a railroad operation that occurs in the United States.

FRA means the Federal Railroad Administration, United States Department of Transportation.

Movement of a train means the movement of one or more locomotives coupled with or without cars, requiring an air brake test in accordance with part 232 or part 238 of this chapter, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains.

Occupancy of a track by a roadway worker or stationary on-track equipment or both refers to the physical presence of a roadway worker or stationary on-track equipment, or both, on a track for the purpose of making an inspection, repair, or another activity not associated with the movement of a train or other on-track equipment.

Person means an entity of a type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; an owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; an independent contractor providing goods or services to a railroad; and an employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any person providing such transportation, including—

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad contractor means a contractor to a railroad or a subcontractor to a contractor to a railroad.

Railroad operation means the movement of a train or other on-track equipment (other than on-track equipment used in a switching operation or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up a train), or the activity that is the subject of an authority issued to a roadway worker for working limits.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include

inspection, construction, maintenance, or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities, or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts.

State means a State of the United States of America or the District of Columbia.

United States means all of the States.

Working limits means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through ''exclusive track occupancy,'' ''inaccessible track,'' ''foul time'' or ''train coordination'' as defined in part 214 of this chapter.

§ 241.7 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions that the Administrator deems necessary.

§ 241.9 Prohibition against extraterritorial dispatching; exceptions.

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, a railroad subject to this part shall not require or permit a dispatcher located outside the United States to dispatch a railroad operation that occurs in the United States if the dispatcher is employed by the railroad or by a contractor to the railroad.

(b) *Emergencies.* (1) In an emergency situation, a railroad may require or permit one of its dispatchers located outside the United States to dispatch a railroad operation that occurs in the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency, and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(c) *Grandfathering.* A railroad may require or permit one of its dispatchers located in a foreign country or in a territory or possession of the United States to dispatch a railroad operation that occurs on a track segment located in the United States, the operation of which track segment was normally controlled during the month of December 1999 by a dispatcher located in that foreign country or that territory or possession of the United States.

(d) *Fringe border operations.* In order to facilitate the safety and efficiency of international train movements, railroad dispatchers located in Canada and Mexico may dispatch additional railroad operations in the United States immediately adjacent to their borders if all of the following conditions apply:

(1) The United States trackage being dispatched does not exceed 100 route miles;

(2) Except for unforeseen circumstances such as equipment failure, accident, casualty or incapacitation of a crew member, each train must be under the control of the same assigned crew for the entire trip over the trackage; and

(3)(i) Train movements on the rail line both originate and terminate in either Canada or Mexico without the pick up, set out, or interchange of cars in the United States; in other words, the traffic on the rail line is ''bridge traffic'' only; or

(ii) In the case of any other rail line, the rail line involved is—

(A) Under the exclusive control of a single dispatching district (''desk''); and

(B) The portion of the line being dispatched extends no farther into the United States than the first of any of the following locations: interchange point; signal control point; junction of two rail lines; established crew change point; yard or yard limits location; inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or location where there is a change in the method of train operations.

(e) *Liability.* The Administrator may hold either the railroad that employs the dispatcher or the railroad contractor that employs the dispatcher, or both, responsible for compliance with this section and subject to civil penalties under § 241.17.

§ 241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, a railroad subject to this part shall not conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside of the United States.

(b) *Emergencies.* (1) In an emergency situation, a railroad may conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside of the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(c) *Grandfathering.* A railroad may conduct, or contract for the conduct of, a railroad operation on a track segment in the United States that is dispatched from a foreign country or from a territory or possession of the United States if the railroad operation occurs on a track segment located in the United States, the operation of which track segment was normally controlled during the month of December 1999 by a dispatcher located in that foreign country or that territory or possession of the United States.

(d) *Fringe border operations.* In order to facilitate the safety and efficiency of international train movements, a railroad may conduct, or contract for the conduct of, the dispatching of railroad operations in the United States from Canada or Mexico immediately adjacent to their borders if all of the following conditions apply:

(1) The United States trackage being dispatched does not exceed 100 route miles;

(2) Except for unforeseen circumstances such as equipment failure, accident, casualty or incapacitation of a crew member, each train must be under the control of the same assigned crew for the entire trip over the trackage; and

(3)(i) Train movements on the rail line both originate and terminate in either Canada or Mexico without the pick up, set out, or interchange of cars in the United States; in other words, the traffic on the rail line is ''bridge traffic'' only; or

(ii) In the case of any other rail line, the rail line involved is—

(A) Under the exclusive control of a single dispatching district (''desk''); and

(B) The portion of the line being dispatched extends no farther into the United States than the first of any of the following locations: interchange point;

signal control point; junction of two rail lines; established crew change point; yard or yard limits location; inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or location where there is a change in the method of train operations.

(e) *Liability.* The Administrator may hold either the railroad that conducts the railroad operation or the railroad contractor that conducts the operation, or both, responsible for compliance with this section and subject to civil penalties under § 241.17.

§ 241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, an owner of railroad track located in the United States shall not require or permit the track to be used for a railroad operation that is dispatched from outside the United States.

(b) *Emergencies.* (1) In an emergency situation, an owner of railroad track located in the United States may require or permit the track to be used for a railroad operation that is dispatched from outside the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the operation was conducted, in writing as soon as practicable, of the emergency, and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(c) *Grandfathering.* An owner of a track segment located in the United States, the operation of which track segment was normally controlled during the month of December 1999 by a dispatcher located in a foreign country or in a territory or possession of the United States, may require or permit the track segment to be used for a railroad operation that is dispatched from that foreign country or that territory or possession of the United States.

(d) *Fringe border operations.* In order to facilitate the safety and efficiency of international train movements, an owner of railroad track located in the United States immediately adjacent to the border of either Canada or Mexico may require or permit the track to be used for a railroad operation that is dispatched from Canada or Mexico if all of the following conditions apply:

(1) The United States trackage being dispatched does not exceed 100 route miles;

(2) Except for unforeseen circumstances such as equipment failure, accident, casualty or incapacitation of a crew member, each train must be under the control of the same assigned crew for the entire trip over the trackage; and

(3)(i) Train movements on the rail line both originate and terminate in either Canada or Mexico without the pick up, set out, or interchange of cars in the United States; in other words, the traffic on the rail line is ''bridge traffic'' only; or

(ii) In the case of any other rail line, the rail line involved is—

(A) Under the exclusive control of a single dispatching district (''desk''); and

(B) The portion of the line being dispatched extends no farther into the United States than the first of any of the following locations: interchange point; signal control point; junction of two rail lines; established crew change point; yard or yard limits location; inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or location where there is a change in the method of train operations.

(e) *Liability.* The Administrator may hold either the track owner or the assignee under § 213.5(c) of this chapter (if any), or both, responsible for compliance with this section and subject to civil penalties under § 241.17. A common carrier by railroad that is directed by the Surface Transportation Board to provide service over the track in the United States of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this section during the period that the directed service order remains in effect.

§ 241.15 Geographical boundaries of FRA's regions and addresses of FRA's regional headquarters.

For purposes of providing emergency notification to the appropriate FRA Regional Administrator(s) as required by §§ 241.9(b), 241.11(b), and 241.13(b), the geographical boundaries of FRA's eight regions and the addresses for the regional headquarters of those regions are listed in Appendix B to this part.

§ 241.17 Penalties and other consequences for noncompliance.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.

(b) An individual who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 241.19 Preemptive effect.

Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable burden on interstate commerce.

§ 241.21 Information collection. [Reserved]

§ 241.23 Termination of this part.

(a) This part is effective from January 10, 2002 through January 10, 2003.

Appendix A to part 241

SCHEDULE OF CIVIL PENALTIES [1]

Section [2]	Violation	Willful violation
241.9:		
(a) Requiring or permitting extraterritorial dispatching of a railroad operation	$7,500	$11,000
(b) Failing to notify FRA about extraterritorial dispatching of a railroad operation in an emergency situation	5,000	7,500

SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section [2]	Violation	Willful violation
241.11 Conducting a railroad operation that is extraterritorially dispatched:		
(a)(i) Generally	7,500	11,000
(a)(ii) In an emergency situation—where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000
241.13 Requiring or permitting track to be used for the conduct of a railroad operation that is extraterritorially dispatched:		
(a)(i) Generally	7,500	11,000
(a)(ii) In an emergency situation—where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $22,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304 and 49 CFR part 209, appendix A.

[2] Further designations for certain provisions, not found in the CFR citation for those provisions, are FRA Office of Chief Counsel computer codes added as a suffix to the CFR citation and used to expedite imposition of civil penalties for violations. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined designation cited in the civil penalty demand letter.

Appendix B to part 241–Geographical Boundaries of FRA'S Regions and Addresses of FRA'S Regional Headquarters

The geographical boundaries of FRA's eight regions and the addresses for the regional headquarters of those regions are as follows:

(a) *Region 1* consists of Maine, Vermont, New Hampshire, New York, Massachusetts, Rhode Island, Connecticut, and New Jersey. The mailing address of the Regional Headquarters is: 55 Broadway, Room 1077, Cambridge, Massachusetts 02142. The electronic mail (E-mail) address of the Regional Administrator for Region 1 is: *Mark.McKeon@fra.dot.gov.*

(b) *Region 2* consists of Pennsylvania, Delaware, Maryland, Ohio, West Virginia, Virginia, and Washington, DC The mailing address of the Regional Headquarters is: Two International Plaza, Suite 550, Philadelphia, Pennsylvania 19113. The E-mail address of the Regional Administrator for Region 2 is: *David.Myers@fra.dot.gov.*

(c) *Region 3* consists of Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida. The mailing address of the Regional Headquarters is: Atlanta Federal Center, 61 Forsythe Street, S.W., Suite 16T20, Atlanta, Georgia 30303. The E-mail address of the Regional Administrator for Region 3 is: *Fred.Dennin@fra.dot.gov.*

(d) *Region 4* consists of Minnesota, Wisconsin, Michigan, Illinois, and Indiana. The mailing address of the Regional Headquarters is: 111 North Canal Street, Suite 655, Chicago, Illinois 60606. The E-mail address of the Regional Administrator for Region 4 is: *Laurence.Hasvold@fra.dot.gov.*

(e) *Region 5* consists of New Mexico, Oklahoma, Arkansas, Louisiana and Texas. The mailing address of the Regional Headquarters is: 8701 Bedford-Euless Road, Suite 425, Hurst, Texas 76053. The E-mail address of the Regional Administrator for Region 5 is: *John.Megary@fra.dot.gov.*

(f) *Region 6* consists of Nebraska, Iowa, Colorado, Kansas, and Missouri. The mailing address of the Regional Headquarters is: 1100 Maine Street, Suite 1130, Kansas City, Missouri 64105. The E-mail address of the Regional Administrator for Region 6 is: *Darrell.Tisor@fra.dot.gov.*

(g) *Region 7* consists of California, Nevada, Utah, Arizona, and Hawaii. The mailing address of the Regional Headquarters is: 801 I Street, Suite 466, Sacramento, California 95814. The electronic mail (E-mail) address of the Regional Administrator for Region 7 is: *Alvin.Settje@fra.dot.gov.*

(h) *Region 8* consists of Washington, Idaho, Montana, North Dakota, Oregon, Wyoming, South Dakota, and Alaska. The mailing address of the Regional Headquarters is: Murdock Executive Plaza, 703 Broadway, Suite 650, Vancouver, Washington 98660. The E-mail address of the Regional Administrator for Region 8 is: *Dick.Clairmont@fra.dot.gov.*

Issued in Washington, DC, on November 30, 2001.

Allan Rutter,

Federal Railroad Administrator.

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