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The Federal Railroad Administration—Lobbyist Participation In Drafting

Organization and Process

The Federal Railroad Administration (FRA) was created when DOT was established in 1966. Executive reorganization at that time authorized the transfer of three Bureaus: Railroad Safety, The Office of High Speed Ground Transportation, and the Alaska Railroad to the FRA. Previously these units had been under the authority of the Interstate Commerce Commission, the Commerce Department, and the Interior Department respectively. Their consolidation under FRA was intended to develop a coordinated national approach to the management and development of rail transportation activities. Research, program analysis and enforcement authority in all matters pertaining to rail transportation and safety were to function as a single unit within the overall organizational structure of DOT.

The Office of the Administrator directs the activities of the three bureaus and the FRA as a unit. Staff assistance is provided through five offices: Administration, Public Affairs, Hearing Examiner, Chief Counsel, and Policy and Program Analysis. It is primarily the latter two offices that are involved in the legislative process.

The Chief Counsel’s Office has a staff of eight attorneys and five secretaries. The general duties of the office are comparable on a smaller scale to the functions of DOT’s Office of the General Counsel. Specific tasks pertaining

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143. Dep’t of Transportation Act of 1966, 80 Stat. 932.
144. The Railroad Safety Bureau is composed of five divisions and a Director’s office and is responsible for all aspects of railroad safety including the initiation of rules, guidelines, standards and legislative proposals. DOT Manual, supra footnote 60 at VII-15.
145. The Office of High Speed Ground Transportation plans and implements research and development in high speed transportation. GSA U.S. GOVERNMENT ORGANIZATION MANUAL 386 (1970-71).
146. The Alaska Railroad operates a total of 482.7 miles of railroad throughout Alaska. Id.
147. Id.
148. Supra note 143. DOT Manual, supra footnote 60 at VII-5.
149. Supra note 143.
150. DOT Manual, supra footnote 60, at VII-5.
151. Id. VII-9 to VII-14.
152. The figures are not inflexible, although eight attorneys seems to be the standard. O'Driscoll interview, supra footnote 68.
153. The DOT Manual, supra footnote 60, at VII-10, lists the following as functions of the FRA’s Chief Counsel’s Office: (a) Provides legal counsel and advice to the FRA Administrator and other offices of the FRA; (b) Directs and administers all legal services required in the operation of the FRA; (c) Cooperates with the General Counsel and other legal offices of DOT; (d) Plans,
to railroad activities can be divided into five major categories: legislation, enforcement of laws and regulations, administrative rule making, policy review and litigation. Each of these is the primary responsibility of a senior attorney.\footnote{O’Driscoll Interview, supra footnote 68.}

The Office of Policy and Program Analysis is the chief adviser to the Administrator on policy development and legislative recommendations. The office establishes the FRA’s intermediate and long-range goals, critically evaluates the operational achievements of the Administration’s programs, conducts systematic studies on the needs and problems of rail transportation and safety, and reviews, evaluates and proposes policy on legislation pertaining to the improvement of the functions of the FRA and railroad activities generally.\footnote{DOT Manual, supra footnote 60 at VII-12. The Office of Policy and Program Analysis is divided into three divisions whose specific research responsibilities are respectively: policy analysis, program analysis and science and technology. Each division’s staff works under the Director of the Office of Policy and Program Analysis who coordinates, reviews and approves policy and program recommendations.}

For specific legislative measures, the FRA’s general procedure is to establish policy guidelines for an area through the work of a “legislative team.” The work is transferred usually in conference to the Chief Counsel’s Office, and specifically to Mr. O’Driscoll. There the legislative proposal is examined on its merits, refined and drafted into legal terminology. The measure is then reviewed and analyzed in both offices, with objections noted and changes recommended. “As the legislative process is repeated,” one spokesman noted, “a continuing and working relationship on the matter is established; the two offices, although each has distinctive duties, in fact contribute in a joint and complimentary way, especially as the idea develops into a concrete legislative proposal.”\footnote{O’Driscoll Interview, supra footnote 68.}

\textbf{The Railroad Safety Bill}

\textit{Origins of the Bill}

The files on the Railroad Safety Bill indicate that FRA’s Office of Chief Counsel had compiled statistics showing a sharply increased number of railroad
accidents throughout the country in December 1967. These figures were available to the agency's policy makers through at least two sources: the National Transportation Safety Board and the Bureau of Railroad Safety. Legislative response to the situation within FRA, however, was negligible until some five months later, when Senator Magnuson, citing a letter to the Washington Post, which noted the concern of the National Transportation Safety Board asked specifically for a report on the matter. What followed was a flurry of activity on the subject by Congress, public interest groups and the agency.

On May 2, 1968, Rep. Staggers, Chairman of the House Interstate Commerce Committee, introduced H.R. 16,980, which proposed a substantial revision of railroad laws. At that time, Chairman Staggers indicated that his committee would hold early hearings on the matter. On May 8th the Association of American Railroads (AARR), representing the industry's management, claimed that the safety record of the railroads was good. Two days later Alan Boyd, then Secretary of DOT, addressed himself to the issue of railroad safety before a Denver Chamber of Commerce meeting. By May 16th the Chief Counsel's Office of the FRA, in conjunction with staff members of the policy unit, had prepared an outline for the agency's testimony at the House hearings scheduled for the next year. The outline included a review of the current railroad safety program, a statement advocating the need for changed authority, a description of the current state regulatory programs and a background

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157. DOT-FRA note 4. 1967 was the 10th consecutive year in which railroad accidents increased. These figures were available to the FRA on a quarterly basis, but they declined to initiate stricter enforcement of existing statutes or new legislation to prevent safety hazards in areas which were not regulated.

158. Both offices are charged by statute with responsibilities in the rail safety area. The NTSB investigates and issues reports on all railroad accidents; the Bureau of Railroad Safety proposes, administers and enforces safety regulations. In an interview, it was noted that the FRA's Chief Counsel's Office enforces the rail safety statutes through reports which the Bureau of Safety and the NTSB acquire independently on railroad accidents. O'Driscoll Interview, supra footnote 68.

159. There is no information in the FRA's files during this period relative to the causes of the accident increase or on the introduction of rail safety legislation. The interviewers asked spokesmen for the FRA whether there was activity that was not reflected in the files. The responses were varied. Some stated vaguely that "there were on-going discussions on methods of improving rail safety." Specifics, however, could not be given. Others stated frankly that the FRA did not have the muscle to initiate the type of broad-based safety bill that was necessary to adequately attack the problem. Others stated that the figures were generally ignored and activity, if there was any, related to the Staggers bill which had been introduced in December of the previous session.

160. DOT-FRA note 5.
162. DOT-FRA note 7.
163. DOT-FRA note 8.
164. DOT-FRA note 9.
discussion of the agency’s railroad safety legislation.\textsuperscript{165}

There was little activity during the changeover from the Johnson to the Nixon administration. Two memoranda were circulated during this time. The first was a draft study of the estimated cost of broadened safety regulation which concluded that the "value of the safety results should be commensurate with the cost of carrying out and adhering to the regulations."\textsuperscript{166} The second included two drafts of H.R. 16,980 written by the FRA for Congressman Stagger’s committee and a letter from the Secretary’s office discussing two provisions of the legislation.\textsuperscript{167}

However, a background memorandum dated November 1968 and interviews in the FRA disclosed that the House hearings and subsequent committee work had produced a markedly negative reaction from the three principal interests involved: railroad management, labor, and the state regulatory authorities. The memorandum noted that "while the majority of the Committee was probably in favor of some kind of legislation, the bill, as presented to them, was not being well received . . . putting aside indirect factors such as the gas pipeline safety controversy, the breadth and scope of the bill was apparently disturbing to both labor and management."\textsuperscript{168} Concern was expressed over the failure of railroad management and the union to get together on the legislation. It noted that the carriers were opposed \textit{in toto} to the bills introduced; that the union had proposed 44 amendments to H.R. 16,980; and that in the first week after the hearings railroad management had been unable to react, while labor introduced a completely new bill.\textsuperscript{169}

\textit{Interest Group Opposition}

\textit{Management}

DOT spokesmen indicated that this type of opposition arose for different reasons among the interest groups. The railroads, it was said, were fearful of the cost and extent of any new regulatory authority in this area. They recognized that the federal statutory authority was a "hodge-podge", largely piecemeal gains scored by the unions, and that as a result, their position in the hearings would be vulnerable. Moreover, it appeared as though the earlier regulations governing safety had been minimally enforced and the means and standards of

\textsuperscript{165} \textit{Id.} This initial draft of the Department’s testimony on rail safety legislation was done substantially by Mr. O’Driscoll of the FRA’s Chief Counsel’s Office.

\textsuperscript{166} DOT-FRA note 11.

\textsuperscript{167} DOT-FRA note 13.

\textsuperscript{168} DOT-FRA note 14.

\textsuperscript{169} \textit{Id.}
that supervision were antiquated in relation to the technological gains made in this area during the last twenty years. Infrequent enforcement, it was noted, was not just the product of federal law and the FRA, but reflected the problem of conflicting and inconsistent regulation on the part of the various state agencies controlling rail transportation. Perhaps equally important, management feared that encroachment in the safety area in the person of stricter federal authority and enforcement of safety statutes would precipitate extending and activating the FRA's general authority over a broad range of railroad activity.170

The Union

Union concerns involved what they considered to be the radical approach of the legislation itself.171 The new safety legislation was designed to replace all the current existing statutes with one all encompassing railroad safety law.172 Ideally this revision and codification of the existing statutes would bring a marked improvement to the status of union members; but this could not be guaranteed. Thus, in addition to the legislative and court battles that could be anticipated, at a minimum the unions would lose the security and protection of the existing law for which, as Mr. Chesser noted in the hearings, "the Brotherhood had fought so dearly to get over the last 60 years."173 Examination of the legislative history of past federal safety laws shows that nearly all were the result of government reactions to major safety defects and were intended to provide coverage to railroad employees in specific areas rather than to present a comprehensive program of accident prevention. The fact that the unions proposed 44 amendments to the Staggers bill is indicative of their real concern that the breadth and revision wrought by the proposed legislation not inundate and subvert the minor gains already secured by their activities.174

DOT Activity

DOT foresaw five major problem areas in the bill that would present the

170. Anonymous interviews in FRA and with congressional staff who worked on the bill. Amending the above, Mr. O'Driscoll felt that the very nature of railroad accidents and the many factors which cause them complicated Federal regulatory enforcement efforts. O'Driscoll Interview, supra footnote 68.
171. See DOT-FRA note 14.
172. The principal bill before the House Committee, H.R. 16,980, 90th Cong., 1st Sess. (1968), contained a provision repealing all existing railroad safety laws upon the Secretary's issuance of departmental regulations preemping the particular area.
174. Id.
greatest difficulties to the committee: (1) the scope of the law relating to the qualification of employees; (2) federal preemption of state jurisdiction; (3) the inclusion of employees in civil and criminal penalties; (4) the use of Administrative Procedure Act requirements in the issuance of regulations; and (5) the definition of railroad commerce in relation to local transit and operations. Specifically, the Department suggested that an in-depth study be conducted on the relationship of labor to management under the coverage provisions of the Act, while the FRA considered other anticipated problems. Finally, the Department concluded that Chairman Staggers had indicated that he was going to have "some" legislation. At this point the FRA was forced to cooperate with the Staggers Committee in order to secure railroad-union agreement on the bill, rather than addressing the issue of rail safety objectively.

There is ample indication that the FRA continued to work on the key areas of conflict through the latter part of 1968. Preliminary legislative material for the first session of the 91st Congress in the form of briefing memoranda were prepared by the Chief Counsel's Office. There is also ample evidence of extensive contacts between the interest groups, the FRA's Chief Counsel's Office and higher administration policy makers. The end result of this activity was the emergence of the tripartite task force on railroad safety (hereinafter referred to as the Task Force).

The Task Force

The utilization of the Task Force as a means of resolving the conflicting interests of the railroad lobbying forces is a key development in the legislative process. It is unclear who suggested this approach, but departmental spokes-

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175. Id.
176. Id.
177. Id.
178. DOT-FRA notes 15 and 16. See also text accompanying footnotes 186-188, infra, discussing the position the FRA and DOT took on the competing demands of the outside interest groups.
179. See e.g., DOT-FRA note 19, in which the FRA Administrator briefs the new Secretary of DOT, Mr. Volpe, on the railroad safety legislation.
180. See DOT-FRA notes 17, 21 and 22. On the legal level Mr. Bernstein, an attorney for railroad management, reviewed and commented on the provisions of the bill offered by Congressmen Staggers after the May, 1968 hearings, indicating management's continuing concern with the specifics of any proposal in this area. DOT-FRA note 17. Labor had scheduled a meeting for February 14, 1969 with Secretary Volpe and the Department's principal railroad policy-makers. DOT-FRA note 21. The files do not adequately show the various pressures brought by the groups involved. During the fall and into the month of January, 1969 there were a number of meetings between policy-makers of the FRA and all of the major lobbying groups involved.
181. DOT-FRA note 22.
182. See text accompanying footnotes 186-205, infra, discussing the involvement of the interest groups and use of the Task Force as a means of securing legislative approval.
183. DOT-FRA note 22.
men indicated that "it was established for purposes of legislative approval."\(^{184}\)

This recognized the necessity for the Department to establish its neutrality. The three groups—labor, management and the state regulatory authorities—had too much influence, both in DOT and Congress, for any one side to trust the matter to an early and open committee hearing.\(^{185}\) Moreover, the Nixon Administration and the FRA saw advantages in the idea of a Task Force from the standpoint of discerning common concerns in a non-public forum. It permitted DOT to say that it had in fact permitted an airing of views; and perhaps most important, it allowed more time for the new administration to settle itself legally and politically on the issues involved.\(^{186}\)

The establishment of the Task Force was announced by the Secretary on April 18, 1969. Its membership included DOT and FRA representatives as well as the lobbying interests.\(^{187}\) During this period a major bill similar to labor's earlier proposals was introduced by Senator Hartke, the Chairman of the Senate Subcommittee on Surface Transportation. Department spokesmen indicated the Hartke bill was used as a starting point for the bill developed by the Task Force.\(^{188}\)

While the Task Force continued its efforts to establish acceptable "legislative recommendations," Senate hearings were held on the Hartke bill.\(^{189}\) Mr. Whit-
man, the FRA Administrator at this time, gave a brief statement on the bill before the Senate Committee. He outlined the necessity for some legislation, but indicated that the work of the Task Force should be examined before the Department committed itself to a specific approach. It seems that the hearings and the Hartke bill itself were intended to generate some partisan support for the labor approach. Thus perhaps affecting the views of the Task Force and certainly encouraging the early issuing of the report.

On June 30, 1969, Secretary Volpe issued the Task Force Report and called it a "landmark of cooperation." However, the files on the safety legislation and interviews indicate that DOT had settled for less than they had expected. As late as June 2nd, Mr. Whitman, the chairman of the Task Force who acted informally as the chief conciliator and moderator of the group, analyzed points of agreement and differences between the three groups and outlined a draft of the Task Force Report, accompanied by a statement of positions, a recommended draft bill, and a section-by-section analysis of its provisions. Divisions on the major points of the bill, had forced the FRA to abandon this package plan and accept instead a report establishing eight basic recommendations upon which the interest groups could agree.

Secretary, Research and Technology; Mr. Whitman, FRA Administrator; and Mr. Corcoran, Chief Counsel, FRA.

190. Mr. Whitman, for example, indicated early in his testimony that the Task Force "had already met three days." 1969 Hearings, supra footnote 189 at 36. To Senator Hartke's specific inquiry as to whether he "basically [found] any reason to be in opposition to S. 1933, which contains broad authority over railroad safety for the Department of Transportation," Mr. Whitman replied, "Mr. Chairman, I pointed out to the Task Force that I would approach this problem with an open mind, and until they give me their recommendations, I am in the embarrassing position of not wishing to prejudge what they might say." 1969 Hearings, supra footnote 189 at 50.

191. DOT-FRA note 36.

192. DOT-FRA notes 34 and 35.

193. DOT-FRA note 35. Departmental spokesmen commented that "realistically" they thought that cooperation of the interest groups to the extent that they established areas of agreement and that a draft bill of sorts was produced indicated that at some reasonable time a measure would be before the Congress. The eight basic recommendations in substance were: (1) That the Secretary have authority to promulgate reasonable regulations in all areas of railroad safety through such procedures as will protect the rights of all interested parties; (2) That a National Railroad Safety Advisory Committee be established which shall consist of representatives of all major interests and which shall advise the Secretary of the reasonableness of such regulations as he may propose; (3) That the Advisory Committee study the various laws pertaining to the transportation of dangerous explosives by rail; (4) That a three year research program be initiated and funded by the Department; (5) That existing rail safety statutes should remain unless preempted by federal regulations and that the administration of such programs be conducted through a federal-state partnership similar to the certification principles of the Natural Gas Pipeline Safety Act of 1968; (6) That formal employee training programs be expanded by labor and management; (7) That an expanded grade crossing program be undertaken; (8) That the FRA should revise its rules for the reporting of rail accidents.
Thereafter, through the summer of 1969, the Task Force attempted to fulfill their original charge and draft a railroad safety bill. Differences among the lobbying interests represented, however, continued to forestall the development of a safety bill, with disagreement evident even on the eight recommendations initially agreed upon. The FRA was again forced to reconcile the differences between the special interest groups.

The extent of the lobbyist's direct involvement is amply illustrated by the files. For example, on July 17th, 18th and 23rd Mr. Loftus and Mr. O'Driscoll of the FRA staff commented on a revised early draft of the safety legislation. In the next two weeks a separate draft was compiled by the Task Force as a whole, with comments to the August 5th draft requested by the Association of American Railroads. Mr. Lyon, the FRA Administrator, wrote still a third draft after the Task Force meeting of August 14th. The files also reveal that substantive comments during this period were received from Mr. Fain of the state regulatory agencies and Mr. Chesser, the labor representative. On September 12th, a draft bill entitled "The Federal Railroad Safety and Research Act of 1969" was agreed upon by the Task Force as the version most acceptable to the members. In transmitting the draft bill to the Secretary, each interest group noted its own differences, confirming the anticipated disagreement on key portions of the bill. The six chief points of contention involved three broad issues:

194. DOT-FRA notes 38-54. The consensus was that the interest groups had clearly anticipated areas of dispute on the specific provisions drafted. The Task Force draft with its written exceptions seems to confirm in general the point that formal agreement upon specific provisions was a near impossible task. This does not, however, invalidate the Department's initial reasons for establishing the Task Force but rather indicates at least three points: first, that there was some procrastination on the part of the groups involved; second, that the absence of public interest representation on issues of major social concern is quite apparent; and, third, it gives some indication of the relationship of the Department to the private interest groups. All these features show considerable involvement by the lobbying interests in the executive bill-drafting process. See text accompanying footnotes 241-243, infra, for the Project's assessment of this involvement.

195. DOT-FRA notes 39-42.
196. DOT-FRA notes 43-45.
197. DOT-FRA notes 52 and 53.
198. DOT-FRA note 54.
199. There were six significant differences among the interest groups:

1. Both labor and the state commissions opposed Section 5 of the bill which provided for the preemption of state regulatory standards by federal standards. Preemption was limited to situations in which the federal standards were equal to or higher than the state standards;

2. Labor opposed Section 7, which would repeal the existing federal safety statutes, and indicated that it would oppose the bill in its entirety if that provision was included;

3. Labor opposed the penalty provisions in the bill as too low, while management opposed them as too high; management, moreover, wanted to limit penalties to knowing and willful violations;

4. Labor wanted the Secretary to have cease and desist enforcement authority, which was not
(1) The question of state regulation, enforcement, and participation;
(2) The effect of the bill upon existing rail statutes, i.e., would the present law be repealed, consigned as regulations under the Secretaries’ authority, or continued and reaffirmed as Federal law; and
(3) The bill’s penalty and enforcement scheme.200

Once the Task Force draft had been submitted DOT was able to draft its own legislation.201 Although direct participation of the interest groups was permitted on the Task Force, DOT did not feel restricted to the Task Force recommendations or to the draft submitted. Some contrary assumptions were held by certain members of the Task Force, however, and as a result the FRA’s safety legislation, when introduced, created misgivings among the lobbyist groups.202 However, the bill was introduced on October 22, 1969, as S.3061 and hearings were scheduled for the next week.203 The period prior to the Senate hearings was used to draft the DOT bill, to process the legislation with the OMB, and to prepare legislative materials particularly on distinctions between the Task Force bill, the Hartke proposal and the administration measure, S.3061.204 Since the preliminary work of the FRA had been so detailed, these matters involved primarily the compilation of material already researched thoroughly. During this drafting and processing stage one notable conflict involved responsibility for railroad workers health and safety. Significantly, this was settled by the White House staff and the OMB representative just prior to its introduction.205

The Senate Hearings

At the Senate hearings the administration proposal was endorsed by the Secre-
tary of Transportation, the FRA, the National Transportation Safety Board, and Mr. Goodfellow, the President of the Association of American Railroads (AARR). The Hartke bill, S.1933, was supported primarily by Mr. Chesser, the national legislative director of the Railroad Labor Executive Association, a union which represents approximately 280,000 operating employees of the railroad. The position of the state regulatory agencies, which differed significantly with the labor stand in only one area, was presented by Mr. Bloom of the National Association of Regulatory Utility Commissioners. The fourth principal witness at the hearings was attorney Ralph Nader, a spokesman for the public interest, who presented an independent analysis of the provisions which he thought should be included to respond effectively to the rail safety crisis. Except for Secretary Volpe and Mr. Nader, all of the main witnesses before the Committee were members of the original Task Force.

The major areas of concern involved five basic issues. Apart from obvious differences in policy, there were seemingly minor discrepancies in the terminology used by the different parties. Yet, as one Department spokesman indicated, much depended upon whose interpretation or wording the committees would accept. In this sense, the safety legislation seemed one of the better examples of the importance attached to the task of choosing and ordering legal terminology.

The first area of significant difference between the witnesses involved the scope of the bill's coverage. The Administration's proposal stated that the Secretary's rulemaking authority would cover all areas of safety involving "railroad operations." Testimony of the parties soon centered upon whether this terminology was sufficient to exclude those employees of the railroad not directly engaged in such activity. Mr. Goodfellow, who favored such exclusion, objected to the phraseology, arguing that the Committee should clarify its meaning and confine safety regulations strictly. Mr. Chesser, the labor re-
resentative, while arguing vigorously that the scope of the Act should be all-inclusive, also questioned the use of the terminology, noting that its vagueness promoted any number of things.\textsuperscript{214}

A second issue on which the witnesses differed involved the procedure by which the Secretary would issue safety standards and regulations under the Act. The Department's proposal called for hearings of "an informal nature" such that notice and procedure should conform to § 553 of the Administrative Procedure Act (APA).\textsuperscript{215} Mr. Goodfellow while supporting the administration's bill "as it was written," suggested a procedure whereby there would be formal evidentiary hearings whenever the Secretary found that a substantial question of disputed fact existed between the parties.\textsuperscript{216} Mr. Chesser stated that the hearings conducted in accordance with § 553 of the APA would be "unacceptable . . . because it does not guarantee an oral presentation."\textsuperscript{217} In this regard, he asserted that under § 2(c) of the Administration's proposal, the Secretary would be permitted to grant an exemption regarding compliance with a safety regulation without a formal hearing.\textsuperscript{218}
The third major issue which divided the key witnesses involved federal preemption and state participation. These sections easily became the most contested portions of the bill. Spokesmen suggested that the reason stemmed inherently from the problem of enforcement and regulation itself. "The States," it was noted, "did not want the laws and regulations already applicable to the Railroads to be abrogated; even more important, they wanted assurances that the existing State enforcement machinery would be able to qualify through statutory procedural requirements as the enforcement authority for the proposed federal safety regulations." The Administration, on the other hand, wanted to leave complete discretion with the Secretary on the key issues of prescribing federal safety standards and involving the States in the federal enforcement scheme.

The fourth major issue involved the status of existing federal railroad safety statutes. The Administration proposal called for the repeal of all existing rail statutes. The bill would, however, continue the substantive requirements of those statutes as departmental regulations until they were acted upon by the Secretary pursuant to the rulemaking procedures established in the Act. Mr. Goodfellow agreed with the Secretary that the existing safety statutes should be repealed. He asserted that it was a "very important element in the bill." It preserved the continuity of the existing rules while eliminating from the permanent structure of regulation the "piecemeal and patchy laws" that had been enacted since 1893. Mr. Chesser, speaking as the union representative, was severely critical of the Administration's attempt to repeal the existing rail safety legislation. "We have fought too many hard and long years to get the safety laws that we now have enacted to permit their summary execution." He argues that their incorporation as regulations will, moreover, fail to withstand the objections that they can be changed, repealed or interpreted contrary to

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219. O'Driscoll Interview supra footnote 68. Secretary Volpe argued that S.3061 had the correct approach to the federal-state question. The Department's bill would first establish that the rules or standards issued by the Secretary under the act would preempt all state and local safety standards on the subject matter. Thus, under S.3061, state and local standards would remain in effect until specific federal standards in the same area were issued. 1969 Hearings supra footnote 189 at 340.

220. 1969 Hearings supra footnote 189 at 340-41. On the other hand, past performance at the federal level established the following offsetting factors:

1. The FRA produced a minimum of investigative and legislative activity particularly during the 1960's when rail accidents were increasing annually;
2. The FRA had inadequate reporting, investigative and enforcement procedures in the areas already within the scope of existing federal statutes; and,
3. The complete grant of authority to the Secretary seemed contradictory to the basic issue of enforcement, since the Secretary still lacked any corrective powers.

221. Id. at 338-39.

222. Id. at 360.

223. Id. at 369.
their full meaning and application as statutes. In addition, he notes that the testimony of the FRA Administrator acknowledged that the federal rail safety laws covered only 5% of the accidents involving railroads. This fact, Mr. Chesser states, is all the more reason for maintaining the existing laws as a "small beachhead." In effect, the unions argued that the Department should prove its performance under the new regulations before Congress abolishes its present statutory authority.

The fifth area of disagreement was the sanctions and penalties which the Department could utilize to enforce the provision of the Act. The Administration bill called for the assessment of per diem civil penalties of $350 to $750 for each continued violation of the regulations. In addition it made available injunctive relief to the Secretary and vested certain general powers of investigation, inspection and enforcement in his office. Mr. Goodfellow of the rail industry objected to these sanctions asserting that the provisions should contain a clause limiting its application to "knowing and willful" violations; that a notice provision should be included; and, that the effective enforcement date should be such as to allow for the possible correction of alleged violations. The unions, on the other hand, advocated the adoption of the Hartke penalty scheme which permitted fines from $500 to $1,000, while granting the Secretary the additional power to issue cease and desist orders. On this point, the Administration contended that the injunctive relief provisions in the act were sufficient for public interest enforcement purposes.

The Senate Bill

On December 2nd, 1969, S. 1933 as amended was voted from the Senate Commerce Committee and reported to the floor of the Senate. It was passed by the Senate just prior to the Christmas recess and House consideration was delayed until the start of the second session. The files suggest that prior to Senate passage, the FRA and the Committee were concerned principally with the sections on state participation and preemption as well as the question of repealing the existing rail safety statutes.

Mr. O'Driscoll continued to work with the Hartke Committee furnishing
additional drafts of testimony, analyzing sections of the legislation and preparing amendments to the departmental bill and early committee prints for selected members of the Committee.\textsuperscript{222} These drafts were given on an unofficial basis, with clearance in the Department limited to three or four personnel.\textsuperscript{223} Again, the tracing procedure reflects quite clearly the extent of the draftsman's participation in the development, consideration and formulation of departmental policy.\textsuperscript{224}

The bill as passed by the Senate was an attempt to pacify all sides on the question of rail safety. For example, on the use of the phraseology "railroad operations" in Section 102, the Senate substituted the statement that the Secretary had authority to prescribe rules in "all areas of railroad safety."\textsuperscript{225} On the question of the existing Federal safety statutes the Committee repealed and consigned as regulations all but two safety laws.\textsuperscript{226} Although this would seem on its face to be a particularly hard loss for the unions, the absence of total repeal seemed to discredit the principal arguments relating to the existence of "piecemeal" laws.

\textit{House Action and Final Developments}

When the measure came before the House the struggle among the interest groups and the FRA became essentially a political one. One spokesman indicated that the specifics of the final bill—conforming in virtually all of its parts to the views of labor—was the result of the "herculean" efforts of Mr. Chesser.\textsuperscript{227}

\textsuperscript{222} See e.g., DOT-FRA note 73.
\textsuperscript{223} O'Driscoll Interview, \textit{supra} note 68.
\textsuperscript{224} See DOT-FRA notes 63-79. On November 28th, for example, Mr. O'Driscoll suggests in a memorandum to the Chief Counsel and the FRA administrator changes which should be made in the Committee print and concessions which the Senate may accept in return. DOT-FRA note 71. He further pointed out that the files necessarily reflected only formal departmental actions in the legislative process. Details pertaining to the specifics of the bill and the substance of the committee report in many cases were agreed upon in conference or in oral conversations. O'Driscoll Interview \textit{supra} note 68.
\textsuperscript{225} S. Rep. on S.1933, 91st Cong., 1st Sess. (1969). Since "operations" is a railroad term of art meaning only that portion of the entire railroading scheme having to do with the physical movement of trains, this charge appears to give DOT broader authority.
\textsuperscript{226} \textit{Id.} Appendix B of the Senate Report contains the text of those statutes not repealed. \textit{Id.} at 40-60.
\textsuperscript{227} Interview with Mr. Lawrence Mann, DOT, February, 1972. Mr. Mann suggested that in the Senate the Administration position on the legislation had been most effectively presented by Senator Prouty of Vermont. In the House, however, a Democratic, pro-labor majority led by Congressmen Staggers and Moss pushed through the pro-labor version to a receptive chamber. Others in the department, including Mr. O'Driscoll, agreed that the policy issues in the House became a secondary consideration to the question of political affiliations and past support.
DOT continued to act as both liaison and sounding board for the views of the opposing interests.¹² Eight Meetings of the principal parties were held in the Department after which written comments were submitted on the sections in controversy.¹³ Internally, the chief policymakers of the FRA continued to review the administration’s legislative position, while Mr. O’Driscoll again prepared updated legislative material for the scheduled committee hearings and subsequent House Report.²⁰

**FRA Evaluation**

The FRA’s development of the rail safety legislation was not extraordinarily skillful. The Project was able to identify a number of problem areas within the Administration which inhibit the drafting of adequate legislation.

**Organizational Outlook**

Like many administrative agencies the FRA has become industry-oriented to the virtual exclusion of other group representatives. There were no consumers groups represented on the Task Force; nor did anyone represent the shipper viewpoint. Apart from the FRA representatives, the other members of the group were drawn only from state regulatory bodies, the union and railroad management groups.²⁴ In his testimony before the Senate subcommittee, Ralph Nader asserted that for years “. . . the Federal Railroad Safety Administration was largely mythical, that it was very poorly named and that the major decisions were delegated to the railroads, particularly the Association of American Railroads.”²⁴²

As a result, much legislation initiated within the FRA carries automatically, and from its inception, a certain bias. It is difficult to draft strong, objective legislation where institutional factors mold the bill from its very beginning.

**The Special Interest Groups**

It is highly questionable that the FRA is proceeding correctly when it invites nongovernmental pressure groups to participate in the development and drafting of a particular piece of legislation. Undoubtedly, input from industry and

O’Driscoll Interview, supra footnote 68.
238. DOT-FRA notes 80 and 87.
239. Id.
240. Id.
241. See footnote 187 supra.
242. 1969 Hearings, supra footnote 189 at 406.
other directly affected groups is necessary to develop sufficient knowledge of
the problem area. But to invite these groups to sit in on the drafting stages of
the legislative process reflects poorly on the FRA. The various administrative
agencies were initially intended to develop their own expertise in the area, not
merely to become channels of communication between the lobbying groups
and the Congress. Moreover, if the special interest group approach to
draftsmanship can be supported, how can the FRA justify the narrow views
actually represented on the Railroad Safety Task Force? If the lobbying
group-task force approach is to be justified its base of representation must be
considerably broader. When engaged in the initial consideration of legislation,
the FRA might better produce its own bill based on its own findings, inde-
dependently of interest group participation.

**DOT Participation**

Unlike the development of the Airways bill by the FAA, DOT input on the
rail safety legislation was remarkably absent. There were, of course, various
communications between the Secretary and the FRA personnel; but there was
virtually no participation by DOT draftsmen as there was in the Airways bill.
FRA draftsmen, particularly when working directly with the Task Force, might
have profited from the more generalized viewpoint possibly provided by depart-
mental legislative personnel. As a result, the FRA was perhaps more respon-
sive, given the institutional bias of the administration toward the rail industry,
to the narrow viewpoints presented by the lobbying groups.

**The DOT Draftsmen**

From the Project's examination of the rail safety legislation and the Airport
Airways Act, it is evident that the Department depends upon a small handful
(approximately five or six) professional legislative attorneys who formulate,
draft and comment upon all of its legislative material. The problem is primarily
one of recognizing the importance of training and utilizing professional drafts-
men as legislative attorneys.

The tracing of the two bills, reveals a number of problems centering upon
the use of the legislative attorney. In the FAA, the tracing procedure in the
Airport legislation and the administration's past performance in appropriation
matters, revolved around the effectiveness and operations of the sub-agency
legislative offices. For a period of over one year, the Airways Bill wallowed

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243. Furthermore, it appeared that much of the industry and union testimony at the Senate
and House hearings was a self-serving attempt to develop a favorable legislative history, not to
provide Congress with the information necessary to enact an adequate piece of legislation.
about in the FAA's legislative office. While it is evident that certain internal policy differences existed among the policymakers in the FAA at the time, the files and the committee testimony suggest that the FAA lacked the necessary supportive legislative materials for promotion of the idea politically. Only after the appointment of Mr. Chernick to the position of Assistant Secretary for Policy and International Affairs in 1969 and the transfer of drafting and coordination responsibility on the Airways Bill to the DOT General Counsel's Office did the FAA develop a viable piece of legislation.

Problems evident in the FRA relating to the attorney-draftsmen, reveal defects of a different nature. The FRA is constricted by institutional leanings toward industry and unduly hampered in its objectivity by too close participation of special interest groups in its drafting process. In sum, the FAA appears to need more skilled professional draftsmen at the sub-departmental level; the FRA should permit its draftsmen to draft without industry interference.

Again, while this would indicate fundamental political problems which are important to discussion of the Department's legislative process, it indicates also the manner in which the legislative draftsman is employed and the viewpoint of an executive agency toward the legislative process.
This file begins with the finding by the department that railroad accidents are increasing at an alarming rate. Hearings are held in the House on a number of bills, however, none is reported during the Second Session of the 89th Congress. The files begin to indicate the legislative process involved, while noting quite clearly the reasons for failure of passage.

The department continues to work on a bill, but soon decides that a Task Force consisting of railroad management, labor and the state regulatory agencies can best establish the general objectives and scope of such legislation. Senator Hartke introduces S.1933 and holds hearings in late March. The Task Force issues a unanimous report consisting of eight recommendations in the area of rail safety.

The Task Force members and DOT work to implement the eight recommendations. A draft bill is reported to the Secretary, with some dissenting remarks on particular provisions. The proximity with which the FRA and the interest groups work together and the duties of the legislative draftsman in the DOT are outlined clearly.

The department drafts its own proposal, S.3061, for the Senate's consideration. Hearings are held during October on this Administration measure and the Hartke bill. The differences between the Task Force members that were indicated earlier become quite clear. S.1933, as amended, is reported by the Commerce Committee and passes the Senate in late December, 1969.

Early hearings are scheduled in the House on three proposals. Contact between the FRA, higher policymakers in DOT and the Task Force members continues. Legislative duties of the Chief Counsel's office are consistent throughout this period. The March hearings reveal two substantial issues which divide the interested parties. S.1933 is reported by the House Committee on June 15, 1970, but it contains major changes from the Senate version.

**Legislative History**

<table>
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<th>Date</th>
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<tr>
<td>Aug. 6, 1970</td>
<td>House debated and passed S.1933.</td>
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<td>Sept. 24, 1970</td>
<td>Conference Rept. on S.1933, H. Rept. 91-1467.</td>
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<td>Sept. 28, 1970</td>
<td>House and Senate agree on Conference Report to S.1933.</td>
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<tr>
<td>Oct. 7, 1970</td>
<td>S.1933 signed into law by President Nixon.</td>
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**NAME**

1. Mr. Boyd

**POSITION**

2. Mr. Magnuson  
   Senator Magnuson, Chairman of the Senate Commerce Committee.

3. Mr. O'Driscoll  
   Attorney, DOT; primary draftsman on the Federal Railroad Safety legislation for the FRA.

4. Mr. Staggers  
   Congressman Staggers, Chairman of the House Interstate and Foreign Commerce Committee.

5. Mr. Menk  
   President, Northern Pacific Ry., St. Paul, Minn.

6. Mr. Corcoran  
   General Counsel, FRA.

7. Mr. Humphrey  
   Vice President Hubert H. Humphrey.

FILE NO. II
8. Mr. Bernstein  
   Attorney, FRA Gen. Counsel’s Office.

9. Mr. Lang  
   Attorney, FRA Gen. Counsel’s Office.

10. Mr. Furphy  
    Attorney, FRA, Gen. Counsel’s Office.

11. Mr. Cherington  
    Asst. Sec. for Policy and International Affairs, DOT.

   12. Mr. Hartke  
       Senator Hartke, Chairman of the Senate Subcommittee.

   13. Mr. Davis  
       Attorney, FRA, Gen. Counsel’s Office.

   14. Mr. Minor  
       Attorney, Sect. Chief, DOT Regulations Division.

   15. Mr. Volpe  
       Secretary Volpe, DOT.

   16. Mr. Whitman  
       Administrator, FRA.

FILE NO. III
17. Mr. Dulski  
   Congressman Dulski.

18. Mr. Loftus  
   Attorney, FRA Gen. Counsel’s Office.

19. Mr. Ashley  
   Congressman Ashley.

20. Mr. Fain  
   Chairman, Missouri Public Service Commission.

21. Mr. Magoon  
   Representative, Michigan Railroad Division.

22. Mr. Lyon  
   Deputy Administrator, FRA.

23. Mr. Goodfellow  
   President of the Association of American Railroads (AAR).

24. Mr. Chesser  
   National Legislative Director of the United Transportation Union (UTU).

25. Mr. Ross  
   Attorney, FRA Gen. Counsel’s Office.

FILE NO. IV
26. Mr. Tidd  
   General Counsel, DOT.

27. Mr. Schultz  
   Director, OMB.

28. Mr. Cotton  
   Senator Cotton, Vermont.

29. Mr. Rodgers  
   General Counsel, National Association of Regulatory Utility Commissioners.

30. Mr. Mattorey  
   Vice President, AARR.
FILE NO. 1

1. Oct. 4, 1967

Subject: Memorandum on Liability of Government.
1. Supplying funds for increased maintenance and safety devices at rail crossings.
2. Increased participation and responsibility for maintenance of such devices under the Federal Tort Claims Act.

Comment: Earliest memo on RR Safety Bill; seems to have originated from general discussion of RR safety.

2. Feb. 6, 1968

Subject: Memorandum on Gas and Pipeline Safety Bill.

3. March 18, 1968

From Secretary of DOT, Boyd, to Member, House of Representatives.

Subject: Government liability re pipeline legislation.

4. Dec. 1967

Statistics on railroad accidents and resulting injuries.
At this time H.R. 16,980 introduced and referred to the House Committee on Interstate and Foreign Commerce.

5. April 10, 1968

Senator Magnuson reads a letter into Congressional Record that appeared in Washington Post. Indicates that he will ask the FRA for immediate report on this matter. Over a year has lapsed since RR Safety was made his responsibility and, to date, only action has been a reorganization of FRA Bureau of RR Safety. The letter indicated that the National Transportation Safety Board was concerned "that train accidents were increasing at an alarming rate."

6. May 2, 1968


7. May 8, 1968

Release by Association of American RRs claiming that safety record for RRs was good.

8. May 10, 1968

Remarks of Alan Boyd, Sec. of DOT to the Denver Chamber of Commerce on RR Safety.

9. May 16, 1968

Outline of RR Safety Bill testimony:
I. Introduction
II. The Current Rail Safety Picture
III. Need for Changed Authority
IV. Current State Regulatory Programs
V. Background of Proposed Legislation
VI. Discussion of Proposed Legislation
VII. Relationship With Other Pending Bills
VIII. How New Authority Would Be Used
IX. Closing Comment

Comment: Bill testimony seems to be done by both the FRA's General Counsel's Office and the policy people in DOT. Generally the outline of the testimony and a substantial portion of the drafts will be done by General Counsel's Office and, specifically, Mr. O'Driscol.

10. May 23, 1968

Hearings before the House Interstate and Commerce Committee on proposed rail safety legislation. Testimony of Mr. Louis W. Menk.
11. May 24, 1968
Draft on Cost of Broadened Safety Regulation to the Railroad Industry.
$25 million each annually (1) more careful track inspection and spot maintenance; (2) more periodic freight equipment inspection; (3) more employee safety training.

Conclusion: Value of the Safety results should be commensurate with cost of carrying out and adhering to the regulations.

12. May 2, 1968
S.4811 introduced in the Senate; DOT Bill on RR safety legislation is introduced, S.3426.

2nd and 3rd Draft Revision of H.R. 16980.
Letter from Sec. of DOT Boyd to Congressman Staggers of House Committee on Interstate and Foreign Commerce discussing:
(1) The justification of §11(c) of H.R. 16,980 (Accident Reports)
(2) Reports on RR Accidents and Casualties.

14. Nov. 1968
Background Memo on H.R. 16,980—Proposed Rail Bill.
(1) After hearings apparent that "while the majority of the Committee was probably in favor of some kind of legislation, the Bill, as presented to them, was not being well received . . . putting aside indirect factors such as the gas pipeline safety controversy, the breadth and scope of the Bill was apparently disturbing to both labor and management."
Generally noted five areas with problems:
(1) Scope of § 3(a) (3) relating to the qualifications of employees and operating rules.
(2) Federal preemption of State jurisdiction.
(3) Jurisdiction.
(4) Inclusion of employees in civil and criminal penalties.
(5) The use of APA requirements in issuance of regulations.
(6) Definition of rail commerce in relation to local transit and operations.

Memo Continues:
Another concern of the Committee was failure of RR and Brotherhood to get together on the legislation.
(1) Carriers opposed in toto to the Bill.
(2) Brotherhoods proposed 44 amendments to Bill.
(3) Staggers made clear that he was going to have some legislation.
(4) After hearings carriers did nothing for a week.
(5) Unions came up with a completely new Bill. Main point being that they want it unlawful for any carrier to use equipment found defective or unsafe by department and have exempted all matters coming within the purview of Collective Bargaining Agreements under the RR Labor Act.

Note added that a more detailed critique provided with our revision of H.R. 16,980.
A Study is suggested on the labor-management relation
under § 3(a)(3), since it was so uncertain in the minds of all on the appropriate legislation.

Comment: This memo summarizes fairly clearly the failure of passage in the 2nd Session of the 90th Congress. Moreover, it analyzes the reasons for the problems and cites generally those areas for concern in the FRA's revision of H.R. 16,980.

15. Dec. 27, 1968
A section by section analysis of the Bill that DOT will propose for the 91st Congress.

From Secretary Boyd to Vice President Humphrey.

Subject: Notes differences between H.R. 16,980 in the 90th Congress and the proposed FRSA of 1969 and the bill itself.

FILE NO. II

17. Jan. 10, 1969
From Mr. Corcoran, FRA Administrator, to Mr. O'Driscoll.

Subject: A letter from Mr. Bernstein, an attorney for the Railway Labor Executive Association, to the FRA on the proposed safety legislation. Mr. Bernstein suggests revisions of the Bill offered by Cong. Staggers on June 17, 1968. Specifically comments on problem areas of the Bill:
(1) Should the Bill be broad or narrow?
(2) The question of State preemption.
(3) Effect on Labor.
(4) Hearings—an APA requirement.
(5) Sanction question.
(6) Industrial relations.

18. Feb. 6, 1969
From Mr. Corcoran, Chief Counsel—FRA, to Mr. Lang.

Subject: Wants Mr. O'Driscoll to make changes on the Bill and circulate the changes and an attached analysis for comment.

19. Feb. 11, 1969
From the Administrator to the Secretary, DOT.

Subject: Briefing on the Rail Safety Act.
(1) Role of DOT to this point.
(2) Mandate from Congress to take effective action.
(3) Efforts made in other fields.
(4) Bill proposed in 1968.
(5) History of Rail Safety—Statute now a patchwork of separate efforts over the past two decades.

20. Feb. 11, 1969
From Mr. Furphy, the enforcement attorney in the Chief Counsel's Office. FRA, to Mr. O'Driscoll.

Subject: Technical inquiry on the rail legislation.

21. Feb. 11, 1969
From FRA Chief to Secretary of DOT.

Subject: To brief the Secretary on a meeting with the representatives of the Railroad Unions scheduled for Friday, February 14, 1969.

Comment: Memo written by Mr. O'Driscoll. This meeting is set for one day after the tripartite idea arises.
Memo written by Mr. MacAnanny, the Ass't Secretary of Policy and International Affairs, DOT.

**Subject:** Memo on the February 13, 1969, idea (no papers found relating to the initiation of this particular idea) of establishing a tripartite task force on the question of rail safety. It is established for purposes of legislative approval. Want to broaden the scope of inquiry because the carriers (RRs) do. The three parties would consist of labor, management and the state regulatory agencies. They realize that they probably won't come up with a unified approach to rail legislation, but suggest that it is important (1) to have the parties examine the problems outside the Congressional hearing rooms and (2) to permit DOT to say that it has conducted such exercise and is able to identify common concerns if not agreement.

There is possibility of early hearings on bill submitted by Staggers (Feb. 18, 1969) so priority.

Contains draft for Secretary with submission of the idea and its purposes for comment to Acting Administrator of FRA.

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**Comment:** It seems that this Bill was drafted and formulated in part at least by the Administration. Mr. O'Driscoll seems to have written at least two drafts of the Bill and those have been commented on by Mr. Davis and Mr. Furphy of the FRA.

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Hearings are to be conducted on S.1933. Mr. O'Driscoll prepares for the FRA Administrator testimony and briefs on possible questions, *e.g.*:

- What can you do to help eliminate the hazardous materials derailment problem?
- What did you have to do with the Army's decision to move nerve gas by rail? Did you approve the route? Why not? What could have been done? etc.

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From Mr. O'Driscoll to Mr. Minor, a section chief of the Regulations Division of the General Counsel's Office of DOT.

**Subject:** Memo on regulations that are applicable to Rail Safety now, facts on accidents. Given to Task Force as information.

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Comments by Mr. O'Driscoll on S.1933, a draft. Noted that the Task Force has been appointed and is at work.

**Comment:** Mr. O'Driscoll has the constant duty of writing memos explaining, reviewing and analyzing bills affecting the FRA before Congress. He also seems to be the coordinator for the FRA regarding the Task Force.

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Statement of Labor views on Rail Safety submitted by the Labor members of the Task Force to the whole body.
29. April 18, 1969
DOT Secretary Volpe has announced the formation of a special task force on Railroad Safety.

30. May 16, 1969
Second draft of comments on selected sections of S.1933. Mr. Furphy and Mr. Davis are asked to supply additional remarks.

31. May 16, 1969
Mr. Lang submits testimony outline to be used before Senate Subcommittee on Safety Bill.

32. May 20, 1969
Testimony of Mr. Whitman (the FRA Administrator) before the Senate Subcommittee on Surface Transportation.

Sen. Hartke asks for further statements in addition to Mr. Whitman's testimony. Wants a comparison of motor carriers and Natural Gas & Pipeline Safety Act as applicable to Railroads.

33. May 23, 1969
Analysis of agreement and differences between the three units in the Task Force by Mr. Whitman.

34. June 2, 1969
Draft of Task Force Report with statement of positions and a draft of a Bill. Also a section by section analysis of the Bill.

35. June 10, 1969
Mr. Whitman's recommendations re Task Force.

Comment: From testimony of Mr. Whitman on S.1933, Secretary Volpe established the Task Force, "made up of top representatives of RR management, RR labor and State regulatory agencies." The (Task Force) staff examined the issues presented regarding the differences found in the positions of the three groups and on June 30, 1969, issued a report to the Secretary of Transportation with eight specific recommendations. Report represents not the official view of DOT, but Task Force view on what can be done to reverse upward trend in rail accidents.

FILE NO. III

36. No Date
DOT Secretary calls the Task Force report of June 30, 1969, a "landmark of cooperation." Wants to cover RR Safety with regulatory authority and be sure that all areas (of RR service) are covered. FRA Administrator to comment on Task Force report.

Comment: Earlier hearings held much of the background of the bill. Their big safety worry seems to be in the movement of chemicals, gases and explosives by RR.

37. No Date
Memo examines excerpts from Task Force Report.

38. July 10, 1969
Early draft—trying to implement the recommendations of the Task Force.

Report of the Task Force on July 8, 1969, of the Congressional Record, H. 5707, Remarks of Mr. Dulski, lists all members of Task Force.

39. July 17, 1969
Mr. Loftus drafts a bill, makes notes on previous drafts done within the Task Force and the FRA.

40. July 17, 1969
Mr. O'Driscoll, a draft.

41. July 18, 1969
Comments on earlier Staff draft.
FRA Staff draft of the Bill.

Draft here by the Task Force as a whole; does not solve all the problems between the three representative groups. A bill on the subject of rail safety introduced at this time by Congressman Ashley.

Comment: Mr. Corcoran was at this time the Chief Counsel for the FRA. Seems to have been a problem finding people for the top administrative positions of the FRA. (Chief Counsel, FRA Administrator and FRA Deputy Administrator).

Changes to the draft of Aug. 5, 1969, asked by the Association of American Railroads (AARR).

Members of Task Force:
Mr. Fain—From the Missouri Public Service Commission.
Mr. Magoon—From the Railroad Division of Michigan.
Mr. Lyon—the Deputy Administrator of FRA.
Mr. Goodfellow—President of the Association of American RR's.
Mr. Chesser—National Legislation Director of the United Transportation Union.

Draft written by Mr. Lyon after meeting of the Task Force on Aug. 14, 1969.

Draft on § 5(a) of the proposed Bill.

Mr. O'Driscoll—view of the June 30th Task Force Report.

Another Bill introduced in House; comment made regarding its effect as to the RR Safety Bill and a question raised as to who will have the authority to administer the Act.

Mr. Lyon, the Deputy Adm. FRA, writes another draft of the Bill—based on prior talks between representative groups.

Mr. Lyon now Acting Administrator of FRA.

From Mr. Ross to Mr. O'Driscoll.

Subject: A proposed draft of § 4; he has redrafted the section and submits as to its meaning and possible interpretation.

From Mr. Fain of the Missouri Public Service Commission to FRA.

Subject: Redrafts of Sections 4, 5 and 8 with comments.

From Mr. Chesser, labor representative, to Mr. Whitman, FRA Administrator.

Subject: A complaint that on August 28, 1969, the FRA came down with a decision which relieved the RR's of some rules and regulations under the Power Brake Law of 1958, without a hearing. He is disturbed and suggests that in a recodification (such as would be involved in the RR Safety Act) he can't trust the FRA.

The first completed draft proposed by the entire Task Force; will be sent to the Secretary. The three representative
groups are not now in agreement, as they had been in the June 30, 1969, report on the need for the legislation. They specify their differences.


**FILE NO. IV**

55. Oct. 6-9, 1969

Denver meeting of State Regulatory Commissioners. At the meeting Federal-State cooperation stressed.


From Mr. O'Driscoll to the Deputy Adm. of the FRA.

*Subject:* On Oct. 2, 1969, there appeared in the Congressional Record the "Federal Coal Mine Health and Safety Act. 1969" (S.2917). Pertinent sections of the Coal Bill will apply to and relate to similar ideas that they (FRA) are trying to get into their Bill.

1. Review by Sec. of DOT
2. Judicial Review
3. Penalties
5. State Plans

*Comment:* Part of Mr. O'Driscoll's function was to check the Congressional Record to note the legislation introduced or comments made that affect the Department and the legislation that it is proposing.

Memo suggests that Mr. Whitman check pgs.

1. S.9297
2. S.9300
3. S.9301

Congressional Record Aug. 6, 1969.

2. Congressional findings and purpose of S.2788.
3. comment on the Federal-State relationship issue of the Rail Safety Bill.
   —Relationship to other Federal Programs.
   —Grants to states.
   —Effect of other laws.

57. No Date

*Comment:* Have only been able to find the one draft of final Task Force report (Sept. 12) that went to DOT. Markup must have been done by (1) DOT—Mr. Tidd and his legislative staff; (2) Mr. O'Driscoll and FRA; (3) resubmission by Task Force; (4) combination of one or more of the above.

58. Oct. 15, 1969

Rail Safety Bill sent from DOT-OMB to the Congress. Speaker letter accompanied with an analysis of the Bill. (S.3061)

In this file also are: (1) Key questions and answers on S.3061. (2) Comparison of S.1933 and S.3061. (3) Comments on Rail Safety Bill from prior Committee Hearings.
Discussion paper with analysis of affect of S.3061.

(5) Analysis of FRA Budget re Safety regulation.


Comment: File does not contain any comments of other agencies affected by the Legislation. Moreover, the File does not reflect any correspondence with OMB.

60. Oct. 20, 1969

From the Acting Chief of the FRA Policy Division to the Deputy Administrator of the FRA.

Subject: Draft of possible questions relating to the Secretary's testimony before the Senate Commerce Committee.

61. No Date

From Mr. Schultz, Director, OMB, to FRA.

Subject: The relationship and scope of the Occupational Health and Safety Act and that proposed in the RR Safety and Research Act.

Issue: Who has authority to regulate occupational health and safety of the RR workers generally, as contrasted with those involved in railroad accidents? (Conflict here seemed to involve the Dept. of Labor and the FRA).

Comment: No correspondence available on this but interviews disclosed that the matter had to be decided at a policy-making level in OMB and the White House. It seems that matters affecting the jurisdiction or authority of conflicting agencies or departments do not normally get resolved through the commenting process, but in the conference and mark-up sessions conducted with the appropriate policy people in OMB. Brings to question again the present interdepartmental commenting process; on matters of minor significance to the department it becomes a paper-shuffling function between the agencies and in those of some substance, the departments often, as a matter of politics, will leave the matter unresolved to the point where crisis management must be employed to settle the dispute.


Secretary Volpe testifies before the Senate Commerce Committee on S.3061.

Chart made of state activity in the area of safety regulation. The concern stems from the fact that the proposed law will usurp state regulation with federal safety standards and federal control.

Chart also of existing RR safety statutes and present FRA authority to change by regulation.

63. Nov. 10, 1969

The Administration Bill is S.3061 and is different from the Task Force bill.

Comment: S.1933 introduced by Sen. Hartke, on RR Safety, is supported by Mr. Chesser, the legislative representative of Railway Labor Executive's Association and a member of the Task Force.

Substantial part of Mr. O'Driscoll's duty is to prepare and supply drafts, comments and memos not only for the FRA and DOT, but for the Senate and House Committee's needs.
Comments or analysis on proposed amendments to S.3061.

64. Nov. 10, 1969
Comparison of provisions of S.1933 (Labor Bill) and S.3061 (Adm.).
Key questions and answers on S.3061.

65. Nov. 4, 1969
Draft of additional testimony of FRA regarding RR Safety sent to Sen. Hartke.

66. Nov. 11, 1969
Draft of proposed amendments to RR Safety Act (S.3061) §§ 5 and 6.

67. Nov. 13, 1969
A senator writes Secretary Volpe saying that he won’t be able to support what he thinks will be the amendments made to RR Safety Act.

68. Nov. 14, 1969
Draft of amendments to S.3061 submitted informally to several members of Senate Commerce Committee. As a staff service only by FRA—never formally approved by FRA or DOT. Comments appear as to the effect of such amendments.

69. Nov. 17, 1969
FRA suggested changes to the subcommittee draft.

70. Nov. 24, 1969
Briefing paper compiled for Mr. Beggs and Mr. Baker re Rail Safety Bill—S.1933.

71. Nov. 28, 1969
From Mr. O’Driscoll to Administrator and Chief Counsel of FRA. Wants to make some changes. Discusses what concessions are needed.

72. Nov. 25, 1969
Subject: Memo on Federal-State problem in Rail Safety.
§7—“is not a model of clarity.” It apparently means that with two exceptions, the federal government would not enforce the safety laws when the states have obtained certification through the FRA or adopt proper enforcement machinery.
Suggests a workable solution to the Federal-State problem with changes to §§ 6 and 7.

Comment: This is an administration bill and a committee print with some changes. The Task Force had been formed because of the failure of the previous Congress to work out a reasonable federal approach to the rail safety problem. Little agreement now among the most interested parties. Task Force had submitted report which all signed. It was based on certain fundamental provisions which everyone could accept.

When the Bill (S.3061) was drafted by the Administration, some of the principles of the Task Force were deleted by DOT, e.g. the certification principle that the states wanted and DOT found unacceptable.

§ 6—Pre-emption of State authority by federal law.
§ 7—Certification of states to conduct safety programs regarding RR.

The above sections are the most controversial of the Bill. Problem over certification centers around the authority to regulate. Seems as if the Department is going to have to compromise its position of federal regulation.
73. Dec. 2, 1969


Note on Rail Safety Bill—again an explanation of the provisions: (1) purpose in setting a deadline of Sept. 1, 1970; (2) an analysis of § 6; (3) purpose of § 6; (4) analysis of § 7; (5) purpose of § 7.

explanations of State participation and State authority to regulate.

has handwritten rough drafts available.


Sen. Cotton wants comments specifically on the provisions of the Committee Print:

—§ 6 revised to make rail safety requirements as nationally uniform as practicable. States retain their standards, but once the federal government sets standard on particular subject matter—the State standards are pre-empted. In local situations the State could regulate.

74. Dec. 2, 1969

RR Safety Bill (S.1933) voted out of Committee.

Comment: It did not include revisions of § 6 and § 7 as desired by FRA. Only through the General Counsel, the FRA, OMB and White House pressure were they able to get some modifications to the committee bill which was reported to the Senate.

75. No Date

Hearings scheduled before the Subcommittee on Transportation and Aeronautics, 91st Congress, 2nd Session, on S.1933, H.R. 7068, 14,417, and 14,478.

76. Dec. 17, 1969

From Mr. O'Driscoll to General Counsel of Commerce Committee of U.S. Senate.

Subject: Effect of repealing the existing rail safety statutes on the federal employer's liability suits.

-states five issues and discusses each.

77. No Date

Another analysis of § 7, State participation.

Comment: There has seemed to be a constant review of the different sections of the Bill. It is likely that it became a necessity because of the frequent changes made and/or suggested by the outside "interest" groups, the Committees and the administration itself. With the task force approach the FRA had to find common ground for regulation first, establish and defend an administration bill and then contend with the views of the Commerce Committee, particularly on the issues of state certification and regulation.

78. Dec. 13, 1969

FRA Administrator holds staff meeting on bill and discusses its possibilities re the 2nd Session of the 91st Congress.

79. Dec. 15, 1969

Mr. O'Driscoll makes advance drafts of Senate Commerce
Committee Report to accompany the Rail Safety Bill and sends copies to Mr. Lyons, Mr. Loftus, Mr. Tidd and Mr. Conway.

S.1933 passes Senate.

FILE NO. V
80. Jan. 30, 1970
From Mr. Kessler, Chief Counsel, FRA, to Mr. Rodgers, Gen. Counsel of National Association of Regulatory Utility Commissioners. Mr. Mattorey, Vice President, Association American Railroads, Mr. Bernstein and Mr. Ross. These people are on the Task Force and they continue to be consulted re departmental changes regarding the RR safety legislation.

The Task Force held a meeting on Jan. 26, 1970. They were informed of the necessity for comments on S.1933 as requested by the House Committee on Interstate and Foreign Commerce.

Contains written draft of proposed amendments to S.1933 by FRA and asks for comments.

Policy meeting of FRA. Messrs. Lyon, Rogers, Loftus and O'Driscoll attend.

82. Jan. 25, 1970
List of items of concern to FRA regarding the rail safety legislation.

83. No Date
Memo on Rail Safety covers:
(1) Role of Department in safety.
(2) Accident reports on RRs.
(3) Review of past proposals and History of rail safety legislation to date.
(4) Current thinking on the subject.

84. March 1970
Memo, questions and answers on rail safety legislation. Contains facts regarding rail accidents and necessity for legislation.

85. Mar. 13, 1970
Memo. Reasons for Repeal of existing rail safety statutes; draft by Mr. O'Driscoll.

86. Mar. 16, 1970
Questions and answers for Secretary Volpe's testimony before the House Committee

87. Mar. 17, 1970
Secretary Volpe gives testimony to Committee chaired by Cong. Staggers.

Cong. Staggers requests additional views of DOT on S.1933. Two problems of the legislation seem to be:
(1) Nature and extent of State involvement.
(2) Combining the past Rail Safety Statutes into single federal law.

On Feb. 10, 1970, Mr. Kessler, the FRA Chief Counsel, had received comments from Mr. Chesser on S.1933 with proposed amendments. The labor view generally is that they want to be able to sue (bring civil suit for damages) and want to retain old statutes on safety legislation. (afraid to replace 50 years of legislative work which the unions had to fight for; fear new combined package will be
open to interpretation in courts and might diminish what rights the rail workers have under existing law).

Memo on whether the replacement of existing statutes by administrative regulation could diminish the rights of rail employees in civil suits.

88. Mar. 18, 1970

DOT answers additional questions of House Commerce Committee on rail safety legislation.

-amendments to S.1933 proposed from Secretary Volpe's testimony before the House Committee.

89. April 4, 1970

Subsequent letter sent by DOT explaining fully the provisions of the Bill before the House Committee.

90. June 15, 1970

S.1933 reported from House Commerce Committee.