

for the Canadian railroads, are discussed in greater detail below.

The railroad employees responsible for actually transporting hazardous materials, *i.e.*, the train crew members, are subject to a variety of requirements that address their fitness for duty, general health, and knowledge of appropriate operating practices. Locomotive engineers are certified pursuant to a comprehensive regulatory regime (49 CFR part 240) that includes safety testing, visual and hearing acuity tests, and alcohol and drug testing (49 CFR part 219). A locomotive engineer's certification may be revoked for failure to follow critical operating rules or for violation of rules concerning alcohol and drug use. *See* 49 CFR 240.117 and 307. In addition, engineers undergo knowledge and operational testing and training periodically that may reveal any severe mental disorder that might jeopardize the person's ability to perform safely. Railroad operating employees almost always work in close proximity to other crew members, so their actions are constantly observed. Abnormal behavior would likely be noticed and reported by fellow employees to management or an employee assistance program. Serious injury can result very quickly while working on or near railroad equipment; consequently, rail employees are typically not tolerant of abnormal or irresponsible behavior in the workplace.

Aside from the locomotive engineer, the other train crew members are conductors and brakemen. FRA's regulations require that, like engineers, these employees are trained and tested on the railroad's operating rules. *See* 49 CFR part 217. These employees are also subject to the alcohol and drug testing regulations, and may be removed from service for violating operating rules or alcohol and drug prohibitions.

We recognize that the background checks conducted by the railroad industry are not as comprehensive as fingerprint-based background checks. However, because of the conditions under which explosives are transported by rail and the difficulty that a potential criminal or terrorist would have in gaining access to or controlling an explosives shipment and the other Federal and industry measures currently in effect, we do not believe that additional regulations concerning railroad employees are warranted at this time. TSA continues to assess the need for more detailed background check requirements in the rail industry and may determine that such standards are necessary in the future.

Because Canadian railroads transport hazardous materials into the United

States, locomotive engineers working for these railroads are often citizens of Canada rather than the United States. TSA recently published a rule that requires Canadian train crews entering this country to be vetted by Transport Canada, the agency in the Canadian government that oversees transportation. (68 FR 6083; Feb. 6, 2003.) A Canadian citizen entering the U.S. via rail with explosives shipments on board is not granted access unless Transport Canada certifies that the individual has completed a background investigation. TSA is in the process of amending this rule to extend its application to Canadians who transport explosives within the United States as well. TSA has met with representatives of Canada on several occasions to discuss these procedures, and will conduct similar discussions with Mexico.

FRA has been granted broad authority over railroad safety, including security, which includes authority to address particular safety or security problems through extraordinary remedies. Under 49 U.S.C. 20104, FRA may issue an Emergency Order imposing requirements to abate an emergency situation involving a hazard of death or personal injury. These orders are issued without notice or prior hearing, and can be directed to corporations or individuals. Using such an order, FRA can impose whatever conditions are necessary to address the emergency, up to and including requiring the cessation of operations on a particular line or removing persons from safety-sensitive service. In addition, FRA has statutory authority to disqualify individuals from safety-sensitive service when it is shown that an individual is not fit for service due to his or her violation of one or more safety laws. 49 U.S.C. 20111(c).

#### **VI. Determination Under 18 U.S.C. 845(a)(1)**

As noted above, 18 U.S.C. 845(a)(1) provides an exception to the prohibited persons provisions in 18 U.S.C. 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air, which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." Under this exception, if DOT regulations address the transportation security issues associated with persons engaged in a particular aspect of the safe transportation of explosive materials, then those persons are not subject to prosecution under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce. In addition, if it is

determined by TSA and DOT jointly that certain aspects of the transportation of explosives do not pose a sufficient security risk and therefore do not warrant regulation, the exception contained in 18 U.S.C. 845(a)(1) also applies, and persons engaged in such transportation would not be subject to criminal prosecution under section 842(i).

DOT is authorized by Federal hazmat law to designate material, including an explosive, as hazardous when transported in commerce in a particular amount and form that may pose an unreasonable risk to health, safety, or security. DOT regulations applicable to the transportation of explosives by all modes include the classification, packaging, hazard communication, and operational requirements described elsewhere in this document. Further, the HMR include specific requirements for security plans and training adopted in the HM-232 final rule.

As discussed in detail above, DOT and TSA assessed the security risks associated with the transportation in commerce of explosives as defined in 18 U.S.C. 841(c)-(f). Based on this assessment, we concluded that the most significant security risks are associated with the transportation of explosives shipments in quantities that require placarding under the HMR. Thus, the HM-232 final rule requires persons who offer or transport shipments of explosives in all modes of transportation that must be placarded under the HMR to develop and implement security plans. There are additional requirements for placarded shipments in transportation, which minimize the risks associated with their transportation. Shipping papers, packaging, car placement, the integrity of seals and closures, hazmat employee training, and maintenance are all areas that must be handled in accordance with prescribed standards.

Non-placarded shipments of explosives are not subject to these requirements. In rulemakings published on May 5, 2003, DOT and TSA determined that non-placarded shipments do not present a sufficient security risk in transportation, at this time, to warrant application of the TSA background check requirements to persons who transport those shipments in commerce or to persons who possess those shipments incidental to transportation in commerce, including persons subject to 18 U.S.C. 842(i). *See* 68 FR 23832 and 68 FR 23852. DOT and TSA continue to assess the security risks posed by the transportation of non-placarded shipments of explosives in commerce and will take appropriate