

Commenters who support the first alternative agree that "rail cars stored on leased track should not be considered "storage incidental to movement" in commerce subject to applicable HMR requirements. Rail cars stored on leased track * * * would then be subject to local regulations, including Federal Risk Management Program (RMP) * * * regulations. * * * This information would assist the local emergency response agencies [to] assess the threat and security of leased tracking." (Contra Costa Health Services)

Commenters who support the second alternative assert that "[e]stablishment of a system where rail cars on the general railroad system do not have to comply with RSPA's regulations addressing shipping papers, securement, and placarding would undermine safety. * * * Furthermore, rail cars on leased track are not always stationary. They are moved. Surely the public interest requires RSPA to apply its hazardous materials regulations to rail cars containing hazardous materials moving on railroad tracks." (Association of American Railroads) Commenters also state that "[t]here could be severe consequences to railroads and their customers were RSPA to conclude that hazardous materials cars on leased track were outside the scope of RSPA's regulations. States and localities could impose unreasonable secondary containment and other requirements making the placement of tank cars on leased track infeasible. There may be inadequate capacity to handle these cars in any other manner, thus dramatically affecting the ability of railroads to transport these cars to destination and the ability of the railroads' customers to continue their operations." (Association of American Railroads) Commenters also suggest that "storage of rail cars on leased track should be considered "incidental" because the cars have not been delivered to the ultimate consignee." (Farmland) As well, commenters state that rail cars "stored on leased track should be considered in transportation. * * * Interim storage locations are not the ultimate destination of the shipments, and the railroad maintains effective custody and control of the shipments." (Monsanto)

After consideration of the comments received on this issue and in consultation with the Federal Railroad Administration (FRA), we conclude that rail cars stored temporarily on leased track, except for leased track that is outside the control and responsibility of the rail carrier and used exclusively for the movement of cars shipped to or from the lessee, is storage incidental to movement and subject to regulation

under the HMR. This determination is consistent with previously articulated interpretations (as discussed in the NPRM, 66 FR 32435), with current FRA policies, and with the definitions adopted in this final rule. See specifically the discussion of the "general railroad system of transportation" under the section entitled "THE EXTENT AND EXERCISE OF FRA'S SAFETY JURISDICTION" in Appendix A to 49 CFR Part 209.

The concepts embodied by the term "leased track" are often taken out of context. As currently set forth in § 171.8 of the HMR, "private track or private siding" is defined to mean:

Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way and includes track or a portion of track which is devoted to the purpose of its user either by lease or written agreement, in which case the lease or written agreement is considered equivalent to ownership.

The key term in the definition is "Devoted to the purpose of its user," a phrase equivalent to the idea of "exclusive use" or "ownership." Either track is used by a railroad, or it is devoted to the exclusive use of another entity. The key to defining "private track" is not the existence of a lease or even a deed of title, but the devotion of that track to the sole purpose of some person other than the railroad. Track may be leased for many purposes for the convenience of the lessee. Many of these leases do not exclude the railroad from using the track for its transportation purposes in addition to the lessee's purposes. Where the railroad has not ceded its care, custody, and control of the track to the lessee, such track remains railroad track and not private track. Where the lessee (in a transportation context, usually a shipper or receiver of rail cars) assumes the care, custody, and control of the track, the track is "devoted" to the purposes of its user and is private track. Rail cars containing hazardous materials that are stored on private track are not stored incidental to movement and are not subject to the HMR; rail cars containing hazardous materials that are stored on railroad track are stored incidental to movement and are subject to the HMR. As explained below, to avoid future misinterpretation, in this final rule we are amending the definition in § 171.8 of "private track or private siding."

As noted above, to conclude that a rail car is stored incidental to movement, we must determine whether the railroad carrier actually exercises ownership or control over the cars and trackage; the facial legal status of the cars and trackage, as expressed in a lease or

written agreement between the parties, is not determinative. Private track may be located directly adjacent to a shipper or consignee facility or within a facility some distance from either the shipper or ultimate consignee. The lessee may have exclusive use of the leased track, or the track also may be used for movement of rail cars other than those of the shipper or consignee. Notwithstanding the terms of any written agreement between the lessee and the rail carrier, if the general system railroad controls the track, then the track is not "private" track for purposes of the HMR.

Railroads often agree to store cars along the route to their ultimate destinations due to fluctuation in seasonal demand for the commodities and limited track space at a consignee's facility. Examples are liquefied petroleum gas, often held at locations distant from its end user pending the demand for the product in cold weather, and anhydrous ammonia, often held until the agricultural cycle requires forwarding to a consignee. In these situations, tank cars may be consigned to interim storage locations on track that is leased for business purposes not relevant to the safety of the cars or the products they contain. These interim storage locations are not the ultimate destination of the shipments, and, in almost all such cases, the railroad maintains effective custody and control of them, which in this final rule is the primary consideration for determining the applicability of the HMR to transportation functions. However, the fact that a hazardous material is in a tank car does not necessarily mean that a railroad is responsible for it. If an entity elects to accumulate hundreds of cars of liquefied petroleum gas or anhydrous ammonia on its own property in order to have supplies readily available when needed, this business decision removes the car from transportation for purposes of the HMR.

Under the Federal Railroad Safety Act (FRSA) and other rail safety laws, FRA has treated leased track as being outside the general railroad system and, thus, outside the scope of FRA's rail safety regulations only if such track is "immediately adjacent" to a plant facility and the "lease provides for, and actual practice entails, exclusive use of that trackage by the plant railroad * * *" 49 CFR part 209, Appendix A. Regardless of the terms of a lease or other written agreement, cars on railroad tracks in railroad yards or sidings distant from the consignee are still on the general railroad system and are ordinarily within the care, custody, and control of the railroad. Even if a shipper or consignee leases such track,